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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

**Courts of Exchequer & Exchequer Chamber,**

FROM

MICHAELMAS TERM, 2 WILL. IV.

TO

TRINITY TERM, 2 WILL. IV., BOTH INCLUSIVE;

WITH

*TABLES OF THE CASES AND PRINCIPAL MATTERS:*



BY

CHARLES CROMPTON, ESQ. OF THE INNER TEMPLE,

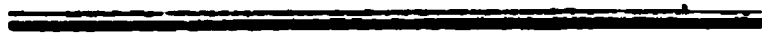
AND

JOHN JERVIS, ESQ., OF THE MIDDLE TEMPLE,

BARRISTERS AT LAW.



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**JUDGES**  
**OF**  
**THE COURT OF EXCHEQUER,**  
**DURING THE PERIOD COMPRISED IN THIS VOLUME.**

---

**The Right Honorable JOHN SINGLETON, Baron LYNDHURST,**  
**Lord Chief Baron.**

**BARONS.**

**Sir JOHN BAYLEY, Knt.**  
**Sir WILLIAM GARROW, Knt.**  
**Sir JOHN VAUGHAN, Knt.**  
**Sir WILLIAM BOLLAND, Knt.**

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**Sir JOHN BAYLEY, Knt.**  
**Sir JOHN VAUGHAN, Knt.**  
**Sir WILLIAM BOLLAND, Knt.**  
**Sir JOHN GURNEY, Knt.**

---

**Sir THOMAS DENMAN, Knt., Attorney-General.**  
**Sir WILLIAM HORNE, Knt., Solicitor-General.**

## CORRIGENDA.



Vol. I. p. 589, last paragraph, *for* "Corporation of H. W.," *read* "Guild of Cordwainers," and vice versa.

Vol. II. p. 47, l. 1, *for* 150*l.* *read* 50*l.*

———— l. 7, *after the word* defendant, *insert* "touching and concerning the said claim in the first count mentioned."

A

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# REPORTS OF CASES

ARGUED AND DETERMINED

IN

**The Courts of Exchequer**

AND

**Exchequer Chamber.**

---

MICHAELMAS TERM, 2 WILL. IV.

## MEMORANDA.

**ON** the first day of this term, *Henry William Tancred, Francis Ludlow Holt, Philip Williams, and Charles Butler*, Esquires, having in the previous vacation been appointed King's Counsel, took their seats within the bar.

1831.

## REGULA GENERALIS.

**IT** is ordered, that, from and after the last day of this present term, the *Exchequer* Office of Pleas be kept open as follows: that is to say, during term, and one week after every term, from eleven o'clock in the morning until three o'clock in the afternoon, and from six to nine o'clock in the evening; and at other times, from eleven o'clock in the

Office hours in  
the *Exchequer*.

1831.

morning until four o'clock in the afternoon, the usual holidays excepted, when the said office is to be closed.

(Signed)

LYNDHURST.

J. BAYLEY.

W. GARROW.

J. VAUGHAN.

W. BOLLAND.

## IN THE EXCHEQUER CHAMBER (a).

(*In Error from the Court of Exchequer*).

The ATTORNEY-GENERAL v. KEY and Others.

In an information for penalties for harbouring goods *liable to the payment of duty*, the Jury found that the goods were imported in smuggling packages, and consequently were *restricted* from being imported—

*Held*, that such goods were, upon the construction of the stat. 6 G. 4, c. 107, s. 128, & 6 G. 4, c. 108, s. 52, *prohibited*, and should have been described as such in the information.

**T**HE information, which was for penalties, in the first count, charged that the defendants did knowingly harbour, &c., certain goods, *liable to the payment of duties on the importation thereof*, which had then and there been imported and illegally unshipped, *the duties thereon not having been first paid or secured*; that is to say, 500lbs. weight of tobacco, and 400 gallons of foreign brandy and geneva, whereby &c., concluding for the penalties. There were also other counts in the information.

At the trial, the Jury found the defendants not guilty upon all the counts but the first, and, as to that count, found a special verdict, “that the defendants imported into the United Kingdom the tobacco in that count mentioned, in packages containing 28lbs. weight each and no more, which said packages were not, at the time the same were so imported, packed in any outward package containing 450lbs. weight net at the least; and that the defend-

(a) The Court of Error sat to hear this and the two following cases, the day before *Michaelmas*

Term, under the stat. 1 W. 4, c. 70, s. 8.

ants imported into the United Kingdom, the foreign brandy and geneva in that count mentioned, in casks containing 4 gallons each and no more, and that the tobacco, and foreign brandy and geneva, were not imported to be legally deposited or warehoused for exportation; and further, that the defendants did knowingly harbour &c., the said goods, well knowing that they had been imported and unshipped in manner and form aforesaid, without any duties thereon having been first paid or secured."

*Exch. Chamber,*  
1831.

ATT. GEN.  
v.  
KEY.

Upon this finding the Court of *Exchequer* gave judgment for the defendants (*a*), being of opinion, that the goods should have been described in the information as goods prohibited to be imported into the United Kingdom; whereupon a writ of error was brought, which was now argued by—

**Sir George Grey, for the Crown.**—Foreign tobacco and foreign spirits are not prohibited goods, in whatsoever quantities they may be imported; but are restricted, merely, by reason of a particular mode of importation. This will appear upon the construction of the different statutable provisions applicable to this subject. By 6 *Geo.* 4, c. 105, all the laws of customs were repealed, with a view to a consolidation, they having become, as recited in that act, intricate by reason of the great number of the fiscal statutes. This consolidation was effected by several subsequent acts; and it is important to remember that the sole object of these statutes was consolidation, and that they contain no new enactment in substance; so that the decisions and precedents upon former statutes are equally authorities upon the construction of the recent acts of Parliament. The information is founded on the 45th sect. of the stat. 6 *Geo.* 4, c. 108, by which it is enacted, "That every person not arrested and detained, as hereinafter mentioned, who shall,

*Exch. Chamber,*  
1831.

ATT. GEN.  
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either in the United Kingdom or the Isle of *Man*, assist, or be otherwise concerned, in the unshipping of any goods which are prohibited, or the duties for which have not been paid or secured; or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, any goods which have been illegally unshipped without payment of duties, or which have been illegally removed without payment of the same, from any warehouse or place of security in which they may have been originally deposited; or shall knowingly harbour, keep, or conceal, &c., any goods prohibited to be imported, or to be used or consumed in the United Kingdom or the Isle of *Man*; and every person, either in the United Kingdom or the Isle of *Man*, to whose hands and possession every such uncustomed or prohibited goods shall knowingly come, shall forfeit either the treble value thereof or the penalty of 100*l.*, at the election of the Commissioners," &c. By this section, the penalty is the same, in respect of prohibited and uncustomed goods, and the objection is, therefore, merely technical. Now it is said, that these are prohibited goods by the provisions of the 6 *Geo.* 4, c. 108, s. 52, and 6 *Geo.* 4, c. 107, s. 128. The 52nd section contemplates two objects, prohibition and restriction, and contains two tables, the one "a list of goods absolutely prohibited," and the other, "a list of goods subject to certain restrictions on importation." In the former, these goods do not occur; in the latter, under the head "spirits," is a provision respecting "all other spirits unless in casks, containing not less than forty gallons;" and under the head "tobacco and snuff," is a provision, that it shall not be imported unless in packages of 100*lbs.* from the *East Indies*, and 450*lbs.* from other places. The object of these tables will be further illustrated by a reference to the schedule of duties, 6 *Geo.* 4, c. 111, in which it will be found, that none of the prohibited goods are in that schedule, except gunpowder, the importation of which may be legalized by the Crown; where-

as, all the goods in the table of restrictions are there mentioned as the subject of duty. It is obvious, therefore, that prohibition is opposed to and contradistinguished from restriction, the latter being merely a regulation for the protection of the revenue. In the schedule of duties no allusion is made to the quantity imported. The character of the goods is not changed by the mode of importation, and, when imported, they are liable to duty. But it is said, that the 6 *Geo.* 4, c. 107, s. 128, declares such goods to be prohibited, as are restricted on account of their package. That section, however, applies only to seizures, and was, as applicable to this subject, unnecessary, because, by 6 *Geo.* 4, c. 108, s. 52, goods imported into this country contrary to the restrictions mentioned in that table, were declared to be forfeited. But any argument upon this clause is answered by the stat. 7 & 8 *Geo.* 4, c. 56, s. 5, by which tobacco and spirits, removed without a permit, shall be deemed to be tobacco and spirits unshipped without the payment of duty, unless the party shall prove the contrary. Now, this provision could not be intended to apply to spirits or tobacco in large quantities; for, in large quantities, those articles are not clandestinely removed; but small quantities require the protection of a permit; and if seized in small quantities, it must be shewn that they have paid the duty, which assumes that, on such, a duty would be payable. Again, the Treasury are empowered by stat. 7 & 8 *Geo.* 4, c. 56, s. 13, to restore goods seized, on such conditions as they may deem expedient; and the Treasury might have restored these goods, on payment of the duty. If, by order of Council, the importation of goods were restricted, could it be said, that, upon the importation of such goods, no duty would be payable. The goods remain in character the same, and when once imported, the duty attaches upon them; in fact it is the constant practice, to sell, at the custom house, for home consumption, goods seized; which could not be, if, according to the argument, such goods were prohibited. But this

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question seems to have been decided in two cases. In *Doe q. v. Cooper* (a), an information was exhibited against *Cooper*, for importing brandy in unsizeable casks; and the question was, upon the stat. 8 *Ann.* c. 7, whether they should be forfeited or pay duty; and though the stat. 4 & 5 *W. & M.*, c. 5, says, they shall be forfeited, or the value; yet three Barons, against *Montague*, gave judgment, that they should pay duty. That, as it appears from the record, was an information for treble value, in the nature of a penalty, upon the stat. 8 *Ann.* c. 7, s. 17, against the defendant for harbouring 60 gallons of brandy, liable to the payment of customs and duties, the customs and duties due for the same not having been paid or secured; the Court gave judgment for the plaintiff. And a question similar to the present must have arisen, (upon the 4 & 5 *W. & M.* c. 5, s. 8, by which it is enacted, that no brandy shall be imported in any vessel or cask of less than 60 gallons), whether the importation in unsizeable casks supported the allegation, that the goods were liable to the payment of duty. In the *Attorney-General v. Jewers and Batty* (b), in an information of debt for the duties, it was objected as to part *scil'*, the *French* wines coming from *Holland*, that they are prohibited and forfeited, and so no duties are payable. *Sims v. Kennison*. But, *per* Lord Chief Baron, after a seizure is made, the Crown cannot make an election, because the right is attached to the informer as to his share; and this is not an absolute prohibition, but a prohibition *sub modo*, as, in the case of brandies, had been resolved ever since the case of *Doe q. t. v. Cooper*. In this case, likewise, nothing appears upon the information, to shew that this was *French* wine; but that fact must have been supplied by the defendants; and the objection was founded upon the stat. 13 & 14 *Car.* 2, c. 11, s. 23, which prohibits the importation from *Holland* of goods, other than

(a) Bunb. 44.

(b) Bunb. 225.

*Flemish*, upon any pretence whatsoever; but as by the stat. 12 Car. 2, c. 4, s. 1, a duty was imposed<sup>h</sup> upon *French* wines, the former was holden to be only a prohibition *sub modo*; and the wine having been imported, it was decided that the duty attached. A decision for the defendants would, in many cases, place the Crown absolutely without remedy. Penalties can only be recovered within a certain time, during which no discovery may be made; and if afterwards an information were to be filed for duties, it may be objected that the goods were illegally imported.

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*John Jervis, contra.*—This question is not touched by the statute 7 & 8 Geo. 4, c. 56, s. 5, because that provision applies only to such goods as a permit would protect, viz., goods liable to the payment of duty, and to goods *in transitu*; whereas, this information is for harbouring and concealing. Neither can this question be decided by the practice which has prevailed, but only upon the construction of the acts of Parliament. It is clear, that an information ought to allege the offence committed according to the words of the act; and the question is, whether, according to the act, these are goods liable to the payment of duty. Now, the stat. 6 Geo. 4, c. 108, s. 45, makes it an offence to harbour four distinct descriptions of goods—*First*, goods illegally unshipped without payment of duty;—*Secondly*, goods legally unshipped, but illegally removed from the place of deposit, without payment of duty;—*Thirdly*, goods prohibited to be imported;—and *Fourthly*, goods prohibited to be used or consumed in the United Kingdom: and these are resolvable into two general heads, which are alone contemplated by all the statutes—customable and prohibited goods. No mention is made of a restriction; and restricted goods must come within one or other of the two general heads. Could the defendants have insisted upon paying the duty on these goods, or could they be legally unshipped, and subsequently

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removed without paying the duties, according to the second description of offence? The stat. 6 *Geo.* 4, c. 107, s. 52, says, that the goods in the table of prohibitions and restrictions *inwards* shall be absolutely prohibited to be imported, or shall be imported only under the restrictions in the table; and, for a breach of the regulations in either case, the goods are forfeited. This, therefore, which is a prohibition *sub modo*, becomes, the condition not being performed, an absolute prohibition, and it is in vain to say that the restricted articles are in the schedule of duties 6 *Geo.* 4, c. 111, for that schedule merely imposes the duty in a certain scale upon goods which may be imported. It would seem that the question is abundantly clear upon this section alone; but all doubt must be removed by the statute 6 *Geo.* 4, c. 107, s. 128, which provides that all goods, the importation whereof is restricted, either on account of the packages or the place from whence the same shall be brought, shall be deemed and taken to be *prohibited* goods. It is said that this provision applies only to seizures; but there is nothing in the provision itself from which this can be collected; on the contrary, these several statutes are always construed as one code of laws, each having reference to and controlling the other, and this provision must be general. Indeed, this provision is necessary to make the several acts consistent; for, otherwise, if restricted goods are not prohibited goods, there is no provision to meet the case of goods which are restricted. By agreement between the commissioners and the trader goods restricted may be imported upon the payment of duty; and, perhaps, where the Crown waives the penalties, duties may be recovered for goods illegally imported; but where both parties stand upon their strict legal rights the Crown cannot at the same time affirm and disaffirm the legality of the importation. This is sufficiently clear from the case of the *Attorney-General v. Jewers and Batty*. With respect to the other case

cited, if any argument can be founded upon it, it is answered by the fact that the statute upon which that information was founded contained no clause by which it was declared that restricted goods should be deemed to be prohibited.

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Sir *George Grey* replied.

LORD TENTERDEN, C. J.—We are of opinion that the judgment of the Court of *Exchequer* ought in this case to be affirmed. This is an information for penalties, and not for the condemnation of the goods, nor for duties; and the question is, whether the goods are properly described in the information. No one can read this information and not see that it charges the defendants with harbouring and concealing goods which have been imported into this country under circumstances in which the duty might have been paid. It is not contended that any instance can be found in which spirits imported in these quantities have been taken to the custom house for the purpose of paying the duty; and the same may be said with respect to tobacco. But it is said, that this information is supported by the finding, because the articles, brandy and tobacco, are liable to the payment of duty. Undoubtedly those articles are liable to the payment of duty, and may be imported under certain restrictions, but we think that these articles are prohibited in the quantities in which they were imported, and should have been so described in this information. It is said, that the 52nd section of the statute 6 *Geo.* 4, c. 108, contains two descriptions of goods; those which are absolutely prohibited, and those in the second table which are only restricted; and if there were nothing more in the statutes upon this subject there might be much in that argument; but the 6 *Geo.* 4, c. 107, s. 128, after a provision applicable to the seizure of goods, enacts, “That all goods, the importation of which is restricted, either on account of the packages or the place from whence the same

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shall be brought or otherwise, shall be deemed and taken to be prohibited goods." Now, this is an express enactment that goods, the importation of which is restricted, shall be deemed to be prohibited goods. But it is said that this provision applies only to seizures. We see no reason why it should be confined to that narrow construction, but think that it ought rather to be taken in its general and enlarged sense. The cases cited do not decide this question. In the first case, *Doe q. t. v. Cooper*, the objection was founded on the statute 4 & 5 W. & M. c. 5, which did not contain an absolute prohibition similar to that in the statute 6 Geo. 4, c. 107, s. 128, but merely enacted that brandy should not be imported in less quantities than sixty gallons. With respect to the other case, I do not by any means say that if the King thinks fit to sue for duties in such a case as this, he may not do so; and I wish this to be understood, in order that I may not be thought to entertain an opinion contrary to that doctrine. However, this is not an information for duties but for penalties; and if the Crown elects to sue for penalties, the information on which those penalties are to be recovered, should charge the circumstances according to the truth, and not in this obscure and ambiguous way, which is calculated to mislead the defendants. For these reasons we are of opinion that the goods are not properly described.

Judgment affirmed.

Taxation of  
costs in error  
from the Court  
of Exchequer.

THE Clerk of the Errors requested to be informed how costs in error from the Court of *Exchequer* were now to be taxed, observing, that formerly such costs were allowed by the Lord Chancellor, who was not by the late act a member of the Court of error.

LORD TENTERDEN said, that he thought the costs in error ought now to be taxed in the same manner as costs were taxed upon bills of exceptions.

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(*In Error from the Court of King's Bench*).

GURNEY *v.* GORDON.

**WHEN** this case was called on for argument—

TINDAL, C. J., observed, that the writ of error was founded upon the statute of *Elizabeth* (a), and was returned under the late statute (b), and was, therefore, *coram non judice*. It was consequently

A writ of error founded upon the stat. 27 *Eliz.* c. 8, cannot be returned under the stat. 1 *W. 4*, c. 70, s. 8.

Struck out.

(a) 27 *Eliz.* c. 8.

(b) 1 *W. 4*, c. 70, s. 8.

(*In Error from the Court of King's Bench*).

RICKETTS *v.* LEWIS.

**THIS** action was originally commenced in the Court of *Common Pleas*, and was removed into the Court of *King's Bench* by writ of error. A writ of error was afterwards brought under the late statute (a) to this Court, and now, when it was called on—

The late stat. 1 *W. 4*, c. 70, s. 8, applies only to cases which are originally commenced in the Court to which the writ of error is directed.

TINDAL, C. J., said, that it was not a case within the letter or contemplation of that statute, which applied only to cases originally commenced in the Court to which the writ of error was directed. He observed that, it was clear that such a case could not be argued before the Judges of

(a) 1 *W. 4*, c. 70, s. 8.

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language is, if you give him credit, not the usual credit, but credit generally, which means if you trust him. It is not to be a dealing on the terms of the trade, but on the terms to be settled between the parties. It must be a fair and reasonable credit, or it might operate as a fraud upon the sureties. The fallacy arises from the use of the word credit. If, after the time for payment has elapsed, you give credit to the principal, you discharge the surety. Here there was no credit given in that sense, but the meaning of the contract was, that the plaintiffs should be paid according to the terms upon which they and the principal should deal.

GARROW, B., concurred.

BOLLAND, B.—I am of the same opinion. This is merely an agreement that the defendants should guarantie the payment for such goods as should be advanced on credit.

Rule refused.

YOUNG, Gent. v. HARRIS.

When the sum in dispute is under 20*l.*, the Court will not grant a new trial, though the verdict is for the defendant.

**ASSUMPSIT** on an attorney's bill. Plea, the general issue and a set off. At the trial at the *London* Sittings, before Lord *Lyndhurst*, C. B., the defendant had a verdict. The plaintiff only claimed 9*l.* 19*s.*

*Andrews*, Serjt., now moved for a rule for a new trial, on affidavits disclosing fresh matter which had come to the plaintiff's knowledge since the trial; and he submitted, that the rule as to a new trial not being granted when the sum in dispute is under 20*l.*, except on the ground of misdirection, applied only to cases where there was a verdict for the plaintiff.

But, *per* BAYLEY, B.—The foundation of the rule is

shortly this; when the sum in dispute is under 20*l.*, and the party would be bound to pay the costs, the Court think it mercy to the parties not to grant a new trial.

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The rest of the Court concurring, the rule was

Refused.

POLGLASS v. OLIVER.

***INDEBITATUS assumpsit.*** Plea—the general issue as to part; and, as to the residue, a tender.

The question, at the trial, before *Taunton, J.*, at the *Bristol* Summer Assizes was, whether the tender was legal. The tender was made in country bank notes; the plaintiff made no objection upon that account, but claimed a larger sum, and said, “I will not take it, I claim for the last cargo of soap.” The learned Judge thought the tender good, and the defendant had a verdict.

A tender in country bank notes is a good tender if the creditor only objects to the *quantum* and not to the *quality* of the tender.

*Barston* now moved for a new trial.—This tender was not good in point of law. According to the earlier cases, the money tendered should be current coin of the realm, or foreign money legally made current by proclamation. *Bac. Abr. Tender*, (B. 2). It must be admitted, however, that bank of *England* notes have been holden to be a good tender if not objected to at the time. *Brown v. Saul* (a). But in *Grigby v. Oakes* (b), *Chambre, J.*, observed, that “it has been thought that the Courts went a great way in holding a tender in bank notes to be a good tender if not objected to at the time;” and there is a palpable distinction between country notes and notes of the Bank of *England*. Bank of *England* notes pass current by universal consent through-

(a) 4 Esp. 267; *S. P. Wright v. Read*, 3 T.R. 554.

(b) 3 B. & P. 529.

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out *England*; not so country notes. Here the parties each stood upon his strict legal rights, and even, though the objection to the quality of the tender may be waived, there must be an express waiver; and here the waiver is at best only implied. Suppose a tender were made in gold bars, would that be sufficient?

[*Bayley, B.*—No. The party would offer what does not ordinarily pass as money.

Lord *Lyndhurst, C. B.*—Gold bars are merchandize.]

The case of *Lockyer v. Jones* (a) also decides that a tender in country notes, if the amount only is objected to, is good; but that case was overruled in *Mills v. Safford* (b), where this Court held that a tender of a *Bristol* bank bill was not a good tender, though no objection was made to it on that account.

[*Bayley, B.*—That case was overruled in *Tiley v. Courtier* (c), *King's Bench, Hilary Term, 1817*, which is probably the case alluded to by Mr. *Peake*, who says “but in a subsequent case in the *King's Bench*, this latter case (d) was again overruled, and the decision of Lord *Kenyon* in *Lockyer v. Jones* established as law].

Lord *LYNDHURST, C. B.*—I am of opinion that this ten-

(a) *Peake, N. P. 239, n.* On a plea of tender of 10*l.* and issue thereon, it appeared in evidence that the tender was made in a *Liverpool* bank bill, and that the plaintiff refused to take it, on the ground that he had a demand for more: and Lord *Kenyon* said, as the objection was to the quantum and not to the mode of payment, he thought the tender good, and the defendant had a verdict. *Lockyer v. Jones, 29th February, 1796.*

(b) *Peake, N. P. 240, n.*

(c) A tender of 102*l.* odd was

made in bank post bills, bank notes, and a *Bristol* bank note: the plaintiff demanded more; he was asked if he objected to the paper, he said that might be good for ought he knew; he did not object to that, but he would not take less than his whole demand: the point was saved, whether this was a good tender, and the Court thought clearly that it was. *Postea* to the defendant. *Tiley v. Courtier, Hilary, 1817.*

(d) *Mills v. Safford, Peake, N. P. 240, n.*

der was sufficient. The plaintiff did not object to the tender because it was made in bank notes, but relied on a different objection. This falls precisely within the principle laid down by Lord *Kenyon* in the case of *Lockyer v. Jones*, in which I fully concur; and which principle is supported by the case to which my brother *Bayley* has referred, and by which the case in this Court was overruled.

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BAYLEY, B.—To make a tender good, it should be made in the coin of the realm, and the money ought to be produced; but the party to whom the tender is made, may make good what would otherwise be insufficient, by relying on a different objection. If he claim a larger amount, and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced (*a*), nor can he object that it was offered in paper. If he object to accept the sum tendered because it is in paper, which he is not bound to receive, he gives the party tendering an opportunity to make his tender in coin; but if he puts his refusal upon a different ground, he waives the objection as to the quality of the tender. In *Lockyer v. Jones*, and the case which I have mentioned, the tender was made in local notes; but, in the former case, Lord *Kenyon* decided, that if, when a tender is made in local notes, an objection is made not to the character of the money but to the quantum, it cannot afterwards be objected that the mode of payment was improper. It seems to me that there is reason and good faith in this decision; for, if you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money and making a good and valid tender; but, by not doing so, and claiming a larger sum, you delude him. I think, therefore, that *Lockyer v. Jones*, and the case to which I have referred, are good law; and

(*a*) See *Black v. Smith*, Peake, 88.

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the only distinction suggested between those cases and the present, *vis.* that in those cases there was an express waiver, here, only an implied one, in my opinion will make no difference. I therefore think that the tender in this case was sufficient.

GARROW, B.—It is much more convenient to the mercantile world, that a tender in paper, if not objected to at the time, should be considered valid.

BOLLAND, B.—I am of opinion that this was a good tender. The objection made at the time was of a different character; and the party is now precluded from saying that it was not a valid tender.

Rule refused (*a*).

(*a*) The demand of a larger sum dispenses with the formality of the tender, even though a receipt be demanded when the tender is made; *Cole v. Blake*, Peake, N.P. 179; or the tender be made in a banker's cheque, *per Buller, J.*,

*Welby v. Warren*, Tidd, 183; or a bank note be tendered in payment of a fractional sum. *Saunders v. Graham*, 1 Gow, 111; *Cadman v. Lubbock*, 5 D. & R. 289. See also *Thomas v. Evans*, 10 East, 101.

### EDWARDS v. BROXON and Others.

The Court refused a rule for a new trial, on payment of costs, for the purpose of enabling a defendant in trespass *q. c. f.*, to amend his plea of a right of way, which described the line of way incorrectly.

**TRESPASS** *quare clausum fregit*. Pleas—general issue and right of way.

At the trial, before *Patteson, J.*, at the last Summer assizes for the county of *Salop*, the defendant proved a right of way, the line of which did not correspond, as to one of the closes through which it passed, with the line of way described in the plea. The defendant had passed over the closes mentioned in the plea. The learned Judge held, that the defendant was bound to prove the line of

way, as it was described in the plea; and the Jury, under his Lordship's direction, found a verdict for the plaintiff with nominal damages.

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*Jervis* now moved for a new trial upon payment of costs, in order that the defendants might have an opportunity of amending the pleadings; and he urged that it was a hard case on the defendants to be defeated on account of an accidental slip in the description of the way, when they had proved a right of way; and he said, that much expense would be saved by this course.

But, *per Curiam*, if you had pleaded the right of way correctly, the plaintiff might have newly assigned *in aliis locis*, for you used the road as pleaded. Do you know any instance of such an application having been made, where the verdict was clearly right and the pleadings were wrong? We recollect no such instance.

Rule refused.

BALME and Others, Assignees of BANKHART and BENSON, Bankrupts, v. HUTTON, Esq., JEWISON, Esq., INGHAM, WOOD, and Others.

**T**ROVER by the plaintiffs, as assignees of the bankrupts, against *Hutton*, the late Sheriff of the county of *York*; *Jewison*, the chief bailiff of the honor of *Pontefract* (a liberty within the county of *York*); *Ingham*, his deputy bailiff; and *Wood* and others, judgment-creditors of the bankrupts.

This Court having ordered a second trial of this cause (a), it came on to be tried before *Bayley, J.*, at the *York Sum-*

A Sheriff, who, under a writ of *fiery facias*, seizes and sells goods of a bankrupt, before commission, but after an act of bankruptcy, without notice of the act of bankruptcy, is not liable in trover; but a Sheriff's bailiff, who has taken an indemnity from the execution creditor, is so liable.

(a) See 2 Y. & J. 101.

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mer assizes, 1830, when the Jury found a special verdict containing the following facts:—

“ *C. Bankhart* and *William Benson*, the bankrupts, for several years before, and up to the time of the issuing the commission hereinafter mentioned, carried on the business of worsted spinners in partnership, at *Bowling*, within the honor of *Pontefract*, in the county of *York*. On the 27th day of *October*, 1825 *Bankhart* and *Benson* were indebted to the defendants, *H. W. Wood*, *J. W. Wood*, and *M. W. Wood*, in a sum of money exceeding 3,500*l.* for wool sold and delivered; and upon that day, at the request of the said Messrs. *Wood*, executed a warrant of attorney for securing that sum and such further advances as in the whole should amount to a sum not exceeding 5,000*l.*; which warrant of attorney was filed within twenty-one days from the date thereof, pursuant to the statute 6 *Geo.* 4, c. 16; and judgment by *nil dicit* was entered up thereon on the 14th *November* following.

“ On the 31st *December*, 1825, the said *C. Bankhart* and *Wm. Benson*, being traders, and indebted to the petitioning creditor in a debt sufficient to support the after-mentioned commission, committed an act of bankruptcy.

“ On the 25th *January*, 1826, the defendant, *Ingham*, (*Jewison* then being chief bailiff of the honor of *Pontefract*, within which honor he has the execution of all writs and appoints his own deputies, from whom he takes bonds with sufficient sureties to indemnify him from the acts of such deputies), by virtue of a warrant directed to *Jewison* and his deputy, (defendant *Ingham*), by defendant *Hutton*, the then Sheriff of the county of *York*, founded on a writ of *fieri facias* issued at the suit of the said defendants, *H. W. Wood*, *J. W. Wood*, and *M. W. Wood*, against the said bankrupts under the judgment aforesaid, returnable on *Monday* next after eight days of the *Purification*, and indorsed, to levy 1,521*l.* 12*s.* 10*d.*, besides &c., seized in

execution certain machinery and utensils of the said bankrupts, in a mill occupied by them at *Bowling* aforesaid.

“ On the same day, a valuation of the said machinery and utensils, together with the said bankrupts’ tenant-right in the said mill, was made by the defendant *Ingham*, amounting altogether to the sum of 1,485*l.*; and the said machinery and utensils, and tenant-right, were on that day purchased at such valuation from the said *Ingham*, acting on behalf of the said chief bailiff, by one *Barker*, a clerk or book-keeper of the said Messrs. *Wood*; but no money was paid by *Barker* or *Wood* to *Ingham*, except the Sheriff’s poundage, and other costs of the levy.

“ Immediately upon the sale, *Barker* took possession of the mill, machinery, and utensils, on behalf of Messrs. *Wood*, and retained possession until the 17th *February* following, when the machinery and utensils were sold by public auction for the sum of 964*l.* 14*s.* 6*d.* (the tenant-right in the mill remaining unsold, but being of little or no value); and the proceeds of such sale were paid over by *Barker* to Messrs. *Wood*.

“ On the day of the sale to *Barker*, Messrs. *Wood* agreed to indemnify the defendant *Ingham* from any action for making the levy, and a bond of indemnity was afterwards executed.

“ On the 21st *February*, 1826, a commission of bankrupt issued against *Bankhart* and *Benson*, under which they were declared bankrupts on the 24th day of the same month.

“ Neither the Sheriff, nor the chief bailiff, nor *Ingham*, knew or had any notice of any act of bankruptcy by *Bankhart* and *Benson* before the return of the writ of *feri facias*.”

The special verdict then proceeded to find *Jewison* and *Ingham* guilty or not according to the opinion of the Court; and it then found *Hutton* not guilty, and *Wood* and the other defendants guilty.

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This case was argued in *Trinity Term* by *Starkie* for the plaintiffs, and *F. Pollock* for the defendants; when all the authorities were elaborately discussed; but, as the Court in their judgment reviewed all the cases minutely, it is deemed unnecessary to state the arguments here.

*Cur. adv. vult.*

The judgment of the Court was now delivered by Lord LYNTHURST, C. B.

This was an action of trover by the assignees of *Bankhart* and *Benson*, bankrupts, against (amongst others) *Hutton*, the Sheriff of the county of *York*, *Jewison*, the chief bailiff of the honor of *Pontefract*, (to whom the execution of all writs within that honor belongs), and *Ingham*, his (*Jewison's*) deputy. The Jury, as to *Jewison* and *Ingham*, found a special verdict, the material facts of which are: That, on the 14th of *November*, 1825, judgment was entered up on a warrant of attorney, against *Bankhart* and *Benson*, at the suit of Messrs. *Wood*, upon which a writ of *fieri facias* was afterwards issued, returnable on *Monday* next after eight days of the *Purification*, that is, the 13th *February*, 1826; that, on the 25th *January*, 1826, *Ingham* seized the goods of the bankrupts, under a warrant from the defendant *Hutton*, grounded upon the said writ of *fieri facias*, and directed to *Jewison*, the chief bailiff, and *Ingham* his deputy; and on the same day, *Barker*, the book-keeper of Messrs. *Wood*, purchased what *Ingham* had so seized, but no money was paid by *Barker*, except the poundage and the costs of the levy. *Barker* resold on the 17th *February*, and the produce of the sale was paid to Messrs. *Wood*; *Ingham* seized under an agreement for indemnity from Messrs. *Wood*, and that indemnity was afterwards given. *Jewison* has bonds of indemnity, with sufficient security, from *Ingham*, and whomsoever he appoints as his deputies, to indemnify him against the acts of such deputies. On the 31st *December*, 1825, *Bankhart* and *Benson* committed acts of bankruptcy, but no

commission issued until the 21st *February*, 1826, and neither the Sheriff nor the chief bailiff, nor *Ingham*, knew of any act of bankruptcy before the return of the *fieri facias*. The seizure, therefore, and the sale to *Barker*, and whatever was done under the *fieri facias*, was done in utter ignorance of any act of bankruptcy; and though there appears to have been some haste, and ground for some suspicion, in the sale to *Barker*, yet, as the special verdict draws no conclusion of fraud in that part of the transaction, we are not at liberty to draw any such conclusion.

The question put to us, is, whether, upon the whole matter, *Jewison* and *Ingham*, or either of them, be guilty.

There is certainly a distinction between *Jewison* and *Ingham*. *Jewison* has, indeed, a security, but it is only the ordinary security, which he takes from every deputy upon his appointment, that he shall be indemnified from the acts of such deputy; whereas, *Ingham* has a special indemnity against this particular seizure, and he has thereby identified himself with the persons from whom he has this indemnity, that is, the execution creditors. To make the chief bailiff liable, under circumstances which would not otherwise make him liable, merely because he has sureties to whom he might resort for indemnity, would be increasing the responsibility of the chief bailiff to an unreasonable extent, and would be a hardship upon the sureties they could scarcely have contemplated; and, upon the argument, this point, that the chief bailiff had security, was not pressed, and we are not aware of any case which would justify its pressure. The chief bailiff takes security, to enable him to throw upon others the responsibility which the law throws upon him; it is contrary to the spirit upon which that security is taken, to give it the effect of casting a responsibility upon him, with which he would not otherwise be burthened; and, we are of opinion, that he stands in the same situation, as if he had not taken such security. The taking an indemnity against the

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consequences of a *particular* seizure, stands upon a very different footing—it puts the officer, who takes it, in the same situation as the person who gives it; and this was pressed in the argument, as bearing upon *Ingham*, and distinguished his case from *Jewison's*. *Aldridge v. Ireland* (a) is a direct authority upon this point; and *Bloxham v. Oldham* (b) might possibly also have proceeded, *as to the Sheriff*, upon this ground. As to *Ingham*, therefore, we have no doubt but that there must be judgment against him.

As to *Jewison*, he stands in the situation of the Sheriff in ordinary cases: if the Sheriff would be liable, he is liable; if the Sheriff would be exempt, he is exempt. Is the Sheriff then liable, when, upon a *fiery facias* against a trader, who has committed a secret act of bankruptcy, of which the Sheriff is wholly ignorant, he seizes and sells? We admit the plaintiff in the execution is liable, because he is bound in this respect, by the relation back to the act of bankruptcy, which the bankrupt laws occasion; but, upon the best consideration we can give the point, and a careful attention to the different authorities which bear upon it, we are of opinion, that the Sheriff is protected by his official character and condition, and that he is not to be made a wrong doer, so as to be answerable in *any species* of action, by relation. We know a distinction has been made, between an action of trespass and trover, and a distinction certainly does exist, because the execution creditor will be liable in trover, though not in trespass; and so will the Sheriff, if he acts after the knowledge of an act of bankruptcy; and it has been supposed, that the Sheriff, though exempt in all cases from an action of trespass, is liable *in all cases* to an action of trover; and though he is as ignorant and innocent when he sells and pays over the money, as he was when he seized, he is to

(a) *Easter Term*, 24 *Geo.* 3, cited 1 *Taunt.* 273.      (b) Cited in *Burr.* 26.

be considered guilty of a wrongful conversion, and answerable to the assignees in an action of trover.

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There are certainly several recent decisions founded upon that distinction, and, had the earlier authorities been brought fully before the Court in any of them, they might have had a degree of weight which it would have been difficult to have withstood; but, if it shall turn out that they were founded almost entirely upon one case, that of *Cooper v. Chitty*(a), without the attention of the Court having been directed to any of the earlier authorities, and that they proceeded upon an erroneous view of *Cooper v. Chitty*, the influence of these decisions will be diminished, and it will be the duty of the Court to restore to the Sheriff that protection to which we think he is by law entitled, namely, the protection of not being considered guilty of a wrongful conversion in trover, where he acts innocently, and in strict obedience to the command of the writ under which he acts.

The Sheriff does not act of his own accord, or for his own benefit; he acts as a ministerial officer, in execution of the command he receives from a Court of Justice in the King's name; and if what he does is, *at the time he does it*, in strict obedience to that command; if it be what the Court itself, if it could itself have acted, would have done; and if it be *at that time* justifiable by the writ under which he acts, it is a strong measure to say that subsequent events shall make that a wrongful act in the Sheriff, which, at the time he did it, was rightful, and shall make him answerable as a *wrong-doer*, for what, at the time he did it, it was *his duty to do*.

The writ in this case commanded the Sheriff, and through him the chief bailiff, to cause to be made, &c., of *the goods and chattels of Bankhart and Benson*—and of whose goods and chattels was the money made? In whom was the property at that time? Notwithstanding the

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bankruptcy, the property remains in the bankrupt till assignment. - The Crown may seize it as the bankrupt's property, notwithstanding a commission, at any time before the assignment, because the relation which the bankrupt laws occasion does not bind the Crown. *Brassey v. Dawson* (a). It is no answer to an action in the bankrupt's name that he is become bankrupt, and that a commission has issued against him, because, until assignment, the property is not transferred. It remains in the bankrupt. *Cary v. Crisp* (b). It is only *by relation*, therefore, that the Sheriff, a public officer, is to be made a wrong doer. And what is the law as to the doctrine of relations? It is laid down in 3 *Coke*, 29. b., that no relation shall make that tortious which was *lawful*, for relations are fictions in law which shall *never do wrong*. In case of relations and other fictions of law they are to certain purposes, and extend only to certain persons. *Ventris, J.*, says, relations shall not do wrong to strangers; they are fictions in law, which are always *accompanied with equity* (c). And, in speaking of the relation of the act of bankruptcy, *Mansfield, C. J.*, says, it is in all cases extremely hard, in some cases extremely shocking, and is not to be carried farther than we are compelled. Is it not suffering then the relation in this case *to do wrong* to extend it to the case of an officer who is acting honestly and in perfect ignorance? And is this to be done to benefit those to whom some degree of negligence is to be imputed, inasmuch as they did not issue a commission immediately after the act of bankruptcy was committed? Let it not be said that the petitioning creditor might not know of the act of bankruptcy. If his ignorance is to excuse him from the charge of negligence, why shall not ignorance equally excuse the Sheriff? Let it be remembered, too, at what distance of time this action might, until the recent limitation, have been brought against the Sheriff. The recent

(a) Str. 977.

(b) Salk. 108.

(c) 2 Vent. 200.

limitation has confined the period to two calendar months, where there was no notice of a prior act of bankruptcy; but, until that limitation, (first introduced by 49 Geo. 3, c. 121, s. 2), the time was indefinite, and the Sheriff, if liable at all, might have been called upon years after his office had ceased. The hardship upon a plaintiff who had got the produce of the levy in his pocket would be great; but the hardship upon the Sheriff would be much greater; and if, according to 3 Coke, 29, relations are to extend only to certain persons, reason and justice would seem to require, in cases like the present, that the relation should be confined to the person for whom the execution was levied, and should not extend to the officer by whom it was ignorantly and innocently executed.

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Let us then examine the cases, and see whether they make any distinction between the plaintiff in the execution and the officer, and whether that distinction is confined to particular descriptions of actions, as actions of trespass, or whether it is not general, extending to every species of actions, and including actions of trover, and actions for money had and received.

The first case upon the point is *Bailey v. Bunning* (a), which was an action of trover against a bailiff, and the Jury found a special verdict. The verdict stated that, on the 6th June, J. S. committed an act of bankruptcy; that, on the 11th June, J. D. sued out a *fieri facias* against the goods of J. S., tested 4th June, under which the defendant, being a bailiff, seized the goods; that a commission of bankruptcy afterwards issued against J. S., and the goods were assigned by the commissioners to the plaintiff; and if *the taking* by the defendant were lawful, they found for the defendant, otherwise for the plaintiff. Two points were argued, one that the act of bankruptcy, (on the 6th June), bound the goods and subjected them to the com-

(a) 1 Levinz, 173.

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mission; for the statute 21 *Jac.* 1, c. 19, s. 9, subjects all goods to the disposal of the commissioners, whereof execution is not served, and executed before such time as the party shall become bankrupt; and here the act of bankruptcy was before the suing out of the writ. Secondly, the special conclusion (that is, if the taking be lawful,) shall not hurt the plaintiff; for, suppose the first taking was lawful, (in respect that the writ should be supposed to have been sued out according to the teste, that is, on 4th *June*), yet execution was afterwards, and though *the taking* were lawful, the detention is illegal; and here a demand and refusal are found, which make a conversion—to which it was answered, that if the writ could be alleged to have been sued out after the teste, yet *the bailiff should be justified*; for he cannot know what act of bankruptcy has been committed, or whether a commission will be sued out; and it is no return for him to say that the party is a bankrupt. *Windham* said, that, notwithstanding the suing out of the writ, the goods were subject to the disposal of the commissioners; but he and *Twisden* and *Keeling* held, that the issue was found with the defendant, for *the taking by him was lawful by virtue* of the writ; and afterwards, *Pasch.* 18 *Car.* 2, the judgment was given for the defendant, *he being an officer obliged to execute the writ, who could not know of the act of bankruptcy, or whether any commission would be issued.* This, then, is a case decided simply on the ground that the defendant was an officer, and that it was from that character, and that alone, that he was protected. The taking was alleged to be lawful upon two grounds: one, that the goods were to be considered as bound by the teste of the writ, which was before the act of bankruptcy, and, therefore, made the seizure lawful as to all the world: the other, that it was lawful in respect of *the character of the person by whom it was made.* The Court disallowed the first ground, and allowed the other. They considered *that, therefore, in respect of the character of the officer,*

lawful, which but for that character would have been unlawful, and would have amounted to a wrongful conversion. This case is also reported, 1 *Sid.* 271, and is there put simply upon the official character of the defendant. It was argued, he says, that the defendant should not be found guilty, because he was *bailiff* and has performed his duty, and has not converted to his own use; but he adds, *quære* hereof, for it was affirmed that the practice is that the bailiff shall be found guilty if the party were then a bankrupt. However, *Pasch.* 18 *Car.* 2, the Court was clear that the bailiff was not guilty of the trover, but that the Sheriff, as this case is found, took the goods *lawfully*; and *Twisden*, J., said, "relation to make trespassers had been strained, particularly in *Turner* and *Folgate's* case." *Turner* and *Folgate's* case is mentioned 2 *Sid.* 125, and 1 *Lev.* 95. It was trespass against the plaintiff in a cause where he had levied upon a judgment, which had afterwards been set aside; and, with reference to this case, *Twisden*, J., said, he was not satisfied with it to make a man a trespasser by relation; and *Levinz* has this note, "the action was against the *party* not against the *Sheriff*, who had the King's writ for his guarantie, which is sufficient for him; for in trespass and false imprisonment it is enough for him to plead the writ; but the party must plead not only the writ but the judgment; and note the difference between charging the officer and charging the party; for, in *Bailey v. Bunning*, the officer shall not be charged where perhaps the party shall." So again, in *Phillips v. Thompson*, 3 *Lev.* 193, the Judges, in noticing *Bailey v. Bunning*, stated, that it was resolved *solely in excuse of the bailiff, who ought to be excused for executing the writ, and not on the ground that the goods were bound by the writ.* It seems to us, therefore, that we are fully warranted in considering *Bailey v. Bunning* as having decided this point: that what in the case of an *ordinary person* would have been an unlawful taking, and consequently a sufficient ground for an

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action of trover, would, in the case of an *officer*, be lawful; upon which an action of trover could not be maintained.

The next case is *Letchmere v. Thorogood*(a): it was an action of trespass by the assignees of *Toplady* against the Sheriffs of *London* and others, for seizing goods under a *fieri facias* against *Toplady*, after an act of bankruptcy committed by him. The act of bankruptcy was committed on the 28th *April*, the seizure was on the 29th. The case was twice before the Court; once, in *Trinity Term*, 4 *Jac.* 2, of which 3 *Mod.* gives the account. And again, 1 *Wm. & M.*, to which *Comberbach* and *Shower* refer. *Shower* says, "I now argued it again upon this point, that though, by the statute of bankruptcy, the property of the goods be vested in the assignees, yet this relation shall not work a wrong to make the officer a trespasser, who had a good authority, and took the goods lawfully: and so is *Bailey v. Bunning*. The Court was clear that the verdict was against the plaintiff, entire damages being given, and that this action lay not against the officer, though trover would against the party." *Comberbach* says nearly the same—"The Court were of opinion, a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time." And *Bailey v. Bunning's* case, in *Sid.*, agrees. Here, then, is another case, in which a distinction is made between the officer and others, in which that which was considered an unlawful taking by others, was considered lawful as to the officer, and where a verdict, which might have been sustained as to the rest, was held not sustainable as to the officers. This, however, was an action of trespass; and, though there is no hint in the reports that the form of the action was the ground of the judgment, or that it would have been different had the action been trover, and though the form of action would have been equally a ground of defence for all the defendants, whether officers or not, yet we can in this case ascertain,

(a) 3 *Mod.* 236; 1 *Show.* 12; *Comb.* 123.

affirmatively, that the form of the action made no difference, and that the judgment would have been the same had the action been trover. An action of trover was brought by the same plaintiff against the Sheriffs the following year; it is reported 2 *Vent.* 169, 1 *Show.* 146: the Sheriff pleaded the former action and verdict in bar; and, upon demurrer, the Court is said to have held the plea good, because it appeared upon the record and the averments, that the plaintiff was barred in the action of trespass upon the merits. *Ventris* says, the case was adjourned. But *Shower*, who was counsel in the cause and who advised the plea, describes it as having been decided: his words are—"I did not argue this because it was in the *Common Pleas*, but advised and drew the plea; and so my poor widow was quit of them at law in both Courts."

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In *Cole v. Davies*(a), *Holt*, C. J., is said to have ruled, that if *A.* be a bankrupt, and, after the bankruptcy, the Sheriff, upon a *fieri facias* against *A.*, seizes the goods and sells them, and a commission of bankruptcy is afterwards issued, and the goods are assigned by the commissioners, the assignees may maintain trover against the vendee; but no action will lie against the Sheriff, because he obeyed the writ. In referring to this position, in *Cooper v. Chitty*, Lord *Mansfield* seems to impugn the authority of this note; but the only objection he makes to it is this, that Lord C. J. *Holt* is represented to have stated, that no action would lie against the Sheriff without making a reserve for cases like *Cooper v. Chitty*, where the Sheriff proceeded to sell after a commission issued, and an assignment made.

This brings us to the case of *Cooper v. Chitty*(b). It was trover by the assignees of *Wm. Johns* v. the Sheriff of *London*. The facts were these:—On the 4th *December*, *Johns* committed an act of bankruptcy; on the 5th, a *fieri facias*

(a) *Ld. Raym.* 724, *Hil.* 10 *Wm.*  
3.

(b) *Bur.* 20; *Sir W. Blacks.* 6; 1  
*Kenyon*, 395.

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issued against the goods of *Johns*, and the Sheriff seized; on the 8th a commission issued, *Johns* was declared a bankrupt, and an assignment of his property was executed; on the 28th, the Sheriff sold his goods. The seizure therefore was whilst the Sheriff was ignorant of any act of bankruptcy; the sale was after full notice; and the decision there, as it seems to us, was simply this—that the seizure, though after the act of bankruptcy, and therefore, independently of the character of the Sheriff, an unlawful act, was, in the case of the Sheriff, justifiable and excusable; but that the sale, as being after full notice of the bankruptcy, was, even in the case of the Sheriff, not justifiable nor excusable, but a wrongful act, and subjected the Sheriff to an action of trover; not, simply, that he had committed a conversion, but on the ground that he had committed what, *even in his case*, was to be deemed a *wrongful* conversion. We are perfectly well aware that, in particular parts of his judgment, Lord *Mansfield* speaks of not making men criminal by relation, of not making them punishable by action or indictment, as trespassers; but there are other parts of the judgment which appear to us to shew clearly, that, by the expression of criminals and trespassers, he meant nothing more than wrong doers, generally; and that he never intended to have it understood that officers who made a mistake through unavoidable ignorance, who were acting innocently at the time, who did nothing but what was innocent, and, in that sense, lawful, were merely exempt from punishment as criminals, and from the action of trespass, but were nevertheless answerable in what would, probably, be nearly, if not just, as penal in its consequences—an action of trover. Unless he meant to convey the notion of perfect indemnity to the officer where there was perfect ignorance, he made a very useless display of what would appear to be legal knowledge, and was filling up six pages with what might have been expressed in six lines. Had he meant that the Sheriff, though a public officer, though acting ignorantly,

though acting innocently, though acting in obedience to his writ, and though exempt from indictment or action of trespass, was nevertheless liable to an action of trover; why did he not say so at once? Why speak of a wrongful conversion, if any conversion was sufficient? Why speak of the selling after notice of the bankruptcy, and after the commission and assignment, if a sale without notice, and before the commission or assignment, would equally support the action of trover? Why say that the Sheriff should not have gone on to a sale, after a full discovery that the goods belonged to a third person (that is, the assignees), if that discovery were immaterial? How, in commenting upon *Cole v. Davies*, could Lord *Mansfield* have said that, upon such a sale as there took place (*i. e.*, a sale before the commission), the conversion might have been as excusable as the taking, because he obeyed the writ, unless he had thought that, to make the sale by the Sheriff a wrongful conversion, it was essential that the Sheriff should know of the bankruptcy at the time he sold. The hardship which he notices, if the Sheriff were made a trespasser by relation, for taking goods where there had been a private act of bankruptcy perhaps many years before, applies equally if the Sheriff is to be made a wrong doer by relation, and therefore liable to an action of trover for selling goods; and how would his answer—that none of the reasons hold to justify him in selling the goods after a commission and assignment—be applicable, if a sale before the commission, and without any notice, would have been equally unjustifiable? How could he have made the observation, that there would scarcely ever be hardship upon the Sheriff, where the taking and sale, or even the sale only, are subsequent to the assignment, had he had the notion in his mind that a sale *before* the assignment, before the commission, and before any knowledge of the act of bankruptcy, would make the Sheriff liable to an action, to which his observations were directed. Does he conclude

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as if he had in his own mind, or meant to convey, any such notion? "The commission and assignment are both notorious transactions; the seizure here is after the act of bankruptcy, and therefore after the property was, by relation, vested in the assignees; but that was innocent and excusable, and the Sheriff shall not be liable, by relation, as a wrong doer. The gist of this action is the wrongful conversion by the sale and false return, long after the commission and assignment." He relies, therefore, upon the notoriety of the commission and assignment, and upon their being prior to the sale, and admits that the seizing was innocent and excusable; and yet, in the action he was considering, an action of trover, an unwarranted seizure would make a wrongful conversion, wherever an unwarranted sale would. It appears to us, therefore, to be clear that the principle upon which *Cooper v. Chitty* was decided, was, that the sale by the Sheriff was a wrongful act, and that the reason why it was wrongful was, because it was after the commission had issued, and therefore the Sheriff ought to have concluded, that there had been some prior act of bankruptcy. We have stated more of the judgment than we should otherwise have done, because of a passage in *Blackstone's* report of the same case; and in deciding between his accuracy and that of Sir *James Burrow*, we thought it desirable that the tenor and scope of Lord *Mansfield's* argument should be observed. Mr. Justice *Blackstone's* report, p. 69, represents Lord *Mansfield* to have said—"Had the sale been immediately after seizure, still the Sheriff would have been liable;" as though Lord *Mansfield* had thought, that, under a direction by the writ to make of the goods of *Johns, &c.*, a seizure by the Sheriff in ignorance would be excusable, yet a sale would not. But that this is a mistake in *Blackstone* is, as it seems to us, clear from what *Blackstone* represents to have been said by the Court in *Timbrell v. Mills, Hilary, 33 Geo. 2*, and by the judgment of Lord *Mansfield* in *Aldridge v.*

*Ireland, Easter Term, 24 Geo. 3 (a).* In *Blackstone's Reports*, in the margin opposite the passage in question is this minute: "*Timbrell v. Mills, contra, Hilary, 33 Geo. 2,*" and in the report of *Timbrell v. Mills, Blackstone, 205*, upon reference by counsel to the doctrine laid down in *Cooper and Chitty*, the whole Court declared it was allowed in that case, that, if the Sheriff levied the money, and paid it to the plaintiff before any commission issued, and without notice of the act of bankruptcy, he would at all events be safe.

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In *Aldridge v. Ireland* there were two points; one of which was, whether trover would lie against the Sheriff for seizing and selling the goods of a bankrupt under a *fieri facias* against the bankrupt, the goods having been duly taken by the Sheriff, and sold by him before the commission. The Sheriff was in fact indemnified, and therefore this point was not material; it was afterwards, however, insisted upon, and Lord *Mansfield* observed—"If this was really the case of a Sheriff who had acted fairly under a writ, without notice of any act of bankruptcy, there are several rules established in *Cooper and Chitty* for his protection; and if he be not indemnified, it may be a ground for a new trial, because the whole proceeded upon that supposition." Is it possible that Lord *Mansfield* could have held this language, had the passage in *Blackstone* been correct, and had *Cooper v. Chitty* really decided that a sale by the Sheriff, whether with knowledge of the bankruptcy or without, was equally a wrongful conversion?

We therefore conclude that *Cooper v. Chitty* decided only, that a sale by the Sheriff, *with notice of the bankruptcy*, was a wrongful conversion by the Sheriff, and a sufficient foundation for an action of trover; but that it left the case of the Sheriff upon a sale *without notice* as much protected as before.

(a) Cited in 1 Taunt. 273.

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In *Coppendale v. Bridgen* and Another, Sheriff of *Middlesex* (a), the distinction is again made between the Sheriff and the execution-creditor, and the Sheriff is considered to be excused where the execution-creditor would be liable. It is not a decision upon the point, it is only an authority from the *dicta* of the Judges. It was an action against the Sheriff, as for a false return of *nulla bona* upon a *fieri facias* against the goods of *Debonaire*. *Debonaire* was in prison for debt from the 2nd *May* to the 5th *July*, on which day (*i. e.* 5th *July*) a commission issued against him. In the interim, *viz.* 18th *June*, the Sheriff seized his goods under the *fieri facias* in question, which issued 17th *June* and was returnable on the 26th. The return was not made till 5th *November*, and as *Debonaire* was then unquestionably a bankrupt, and had been so by relation from the beginning of *May*, the Court considered the return to be true; but they nevertheless looked at what would have been the state of things had the return been made at the return of the writ, *viz.* 26th *June*; and what would have been the respective condition of the execution-creditor and the Sheriff; Lord *Mansfield* said—"Had the Sheriff returned on 26th *June*, that he had levied and paid over, he would have been excused, for he could not then have known that *Debonaire* would lie two months in prison; and was, therefore, under invincible ignorance as to that event, but the plaintiff could have had no advantage; he would have been liable to refund, though the Sheriff might have been excusable in paying him. *Dennison*, J., said, had he made such return, &c., perhaps he might have been justified, yet the plaintiff must have refunded. And *Wilmot*, J., added, no doubt the assignees might have recovered the money from the plaintiff. This, though it is an authority as far as it goes in favour of the defendant, is by no means so strong as the other cases we have mentioned; and we only notice it that it may not ap-

(a) Burr. 814.

pear to have been overlooked, and to shew, that, though the Judges were clear there would be a relation back as against the execution-creditor, they did not express a similar opinion as to the Sheriff.

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The next case in order of time, is *Hitchin v. Campbell* (a), in which there certainly is an *obiter dictum*, which may be considered as making against the Sheriff; but it is an *obiter dictum* only, and by no means called for by the judgment given. It was an action by the assignees of *Anderson*, a bankrupt, against an execution-creditor for money had and received, to recover the amount of a levy upon a *fieri facias* against *Anderson*: there were two questions—one, whether the action for money had and received lay against the execution-creditor? and the Court held that it did—the other, whether a former verdict and judgment for the defendant and the Sheriff in an action of trover for these goods, was a bar? and the Court held that it was. *Blackstone*, 829, represents *De Grey*, C. J., to have said—"Notwithstanding the transfer of the property by relation, the Sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy, and before the commission issued; it was so ruled in *Letchmere v. Thorowgood* (b), and in *Cooper v. Chitty* (c). But, by selling, the Sheriff converts the goods; and then trover is maintainable against the Sheriff or his vendee, or the plaintiff in the original action." *Wilson* represents the Court to have said—"We are of opinion that the plaintiff, having brought trover against the Sheriff and the now defendant (which action will lie) have made their election, and are barred by the former verdict and judgment." The only expression which can be considered as bearing against the Sheriff, is that in *Blackstone*—"by selling, the Sheriff converts the goods, and then trover is maintainable against the Sheriff, &c." and that in *Wilson*

(a) 3 Wils. 304; Sir W. Bl. 827. Mod. 236.

(b) Comb. 123; Show. 12; 3 (c) Burr. 20.

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—“ which action will lie.” But we think it would be too strong an inference to draw from these expressions, that the Sheriff was at all events liable, though he sold under ignorance of the bankruptcy, or that they meant to carry his liability beyond the extent of the former decisions.

This brings us to the case of *Smith v. Milles* (a), which was in all respects similar to *Cooper v. Chitty*, except that the action was trespass, not trover. The seizure there was after the act of bankruptcy, but before the commission, and the sale long after the commission and assignment. The act of bankruptcy was on the 1st *February*, and the seizure on the 23rd, the commission on the 27th, the assignment on the 28th, and the sale on the 13th *March*. There was no doubt, therefore, that there was not merely a conversion but a wrongful conversion, a conversion after knowledge of the bankruptcy: so that, upon the principles of *Cooper v. Chitty*, trover would undoubtedly have lain. The question was, whether the action of trespass, which was for the seizure, was maintainable. *Ashhurst, J.*, who delivered the opinion of *Buller, J.*, and himself, says, “ I know no instance where a man who has a new right given him, which, from reasons of policy, is so far made to relate back as to avoid all mesne incumbrances, should be taken to have such a possession as to bring trespass for an act done before such right was given him; but, at all events, the rule will hold with respect to *officers and ministers of justice*,” and he instances *Letchmere v. Thorowgood*, (referring probably to the action of trespass); and *Bailey v. Bunning*, which was trover. He adds, “ in *Cooper v. Chitty*, Lord *Mansfield* lays down the true ground of distinction between trover and trespass as applied to this case; the plaintiffs, therefore, are not injured, as they may recover the value of the goods in trover.” What, then, is the ground of distinction between trover and trespass, as applied to *Smith v. Milles*, laid down by Lord *Mansfield* in

(a) 1 T. R. 475.

*Cooper v. Chitty*. What but this? That a seizure after an act of bankruptcy, though not lawful as against the execution-creditor, is excusable as against the Sheriff, if made in honest ignorance by him, and cannot be made the subject of an action of trespass (or of any other action) against him; but that, if he be afterwards guilty of a wrongful conversion (*i. e.* a conversion after notice of the bankruptcy), though this will not make him a trespasser by relation, or trespasser *ab initio*, or make his *taking* unlawful, it will make him answerable for that conversion in an action of trover. *Smith v. Milles*, therefore, recognises the distinction between an *officer and minister of justice and other persons*, it refers to one of the instances in which that distinction was allowed in an action of trover, *viz. Bailey v. Bunning*, and appears to us to leave the Sheriff in the situation in which *Cooper v. Chitty* left him.

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In *Vernon v. Hankey (a)*, Mr. Justice Buller notices the protection to which Sheriffs, as ministers of justice, are entitled, and takes the distinction in cases in which they act in honest ignorance, from those in which they have notice. "The Courts" he says, "have said that Sheriffs, being *ministers of justice*, are entitled to the protection of the Courts if they act honestly: but it has always been held as clear law, that, if a Sheriff, after *notice of a bankruptcy*, proceed to levy, though no commission be then taken out, he must do it at the peril of answering to the assignees.

Thus stood the authorities till 1807. In that year, the case of *Potter v. Starkie* was tried before Wood, B., at Lancaster Assizes. It was the first circuit that that able Judge ever went. It appeared in evidence that, on the 1st of the month, a *fieri facias* against *I. S.* was delivered to the Sheriff; on the 2nd, *I. S.* committed an act of bankruptcy; and on the 3rd, the Sheriff seized. Wood, B., held the Sheriff liable: *Rich-*

(a) 2 T. R. 122.

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*ardson* obtained a rule *nisi* for a new trial, and cited *Cooper v. Chitty*, and *Timbrell v. Mills*, and insisted that the ground of decision was, that the sale was after assignment. *Williams, contra*, insisted that the Sheriff had not taken the goods mentioned in the writ, *i. e.*, the goods of *I. S.*, but the goods of other persons, and that he was therefore guilty of a conversion. The Court were of that opinion, and discharged the rule; and the ground of the decision (as *Richardson* is represented to have stated) was, that, according to *Cooper v. Chitty*, the property must be considered as divested by the bankruptcy. This account is from *Selwyn's Nisi Prius*, 1431; the same case is also cited in 4 *Maule & Selwyn* (a), and there the statement is—the Court held the Sheriff liable in trover, though he seized, sold, and paid over the money before any commission issued, and before any notice, saying, this necessarily followed from *Cooper v. Chitty*, for it was an unlawful interference with another's goods. It is obvious to remark, that *Bailey v. Bunning* was not cited, nor *Letchmere v. Thorowgood*, nor *Cole v. Davies*, nor *Aldridge v. Ireland*; the distinction between the officer, who is a minister of justice, and therefore forced to act, and the execution-creditor, for whose benefit the officer acts, and who alone has the fruits of the execution, was not brought under the notice of the Court; and, upon the sole authority of *Cooper v. Chitty*, and the doctrine of relation there established (*i. e.* a relation which binds the execution-creditor in all cases, and the Sheriff when he has notice of the bankruptcy), the case was decided against the Sheriff.

The next case in order of time is *Wyatt v. Blades* (b), 3rd June, 1813. The act of bankruptcy there was on the 8th December, the Sheriff seized under a *fieri facias*, 8th February, and removed the goods; 12th February a commis-

(a) 4 M. & S. 260.

(b) 3 Campb. 396

sion issued, and the Sheriff had notice not to sell; he acquiesced in that notice, and did not sell; notwithstanding which, the assignees brought trover against him: the only point stated to have been raised, was, whether there had been a conversion; and Lord *Ellenborough* held the removal of the goods a sufficient conversion. Upon this statement, it is so doubtful whether the point now under consideration was ever raised, or, if raised, what was Lord *Ellenborough's* opinion respecting it, that we think no material stress can be laid upon it.

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The next case is *Laxarus v. Waithman* (a). It was trover against the Sheriff of *London*, for seizing and selling, under a *fieri facias* against *Jackson*. The seizure was on the 15th *November*, the sale 21st *December*, but *Jackson* had committed an act of bankruptcy on the 6th *November*, and the commission issued on the 23rd *December*: the assignment was not executed till 6th *January*. There was a verdict for the plaintiff, and a motion for a new trial, simply on the ground, that the sale was before the assignment; under what circumstances the Sheriff sold, whether he knew of the act of bankruptcy, whether he was indemnified or not, are points upon which the report is silent. The single ground mentioned for the motion, is, that the sale was before the assignment, and this was clearly no ground. Whenever the assignment was made, it would relate back to the time when the act of bankruptcy was committed; and so, as the assignees brought *trover* not *trespass*, would support an action for a wrongful sale. *Dallas*, C. J., thought the distinction between *trespass* and *trover* clearly laid down in *Cooper v. Chitty*, and recognised in *Smith v. Milles*. *Park*, J., thought the ground of the motion untenable, unless the decision in *Cooper v. Chitty*, and all the cases governed by it, were to be overturned. *Burrough*, J., said the point was settled long before he knew *West-*

(a) 5 B. Moore, 313, (Pasch. 1821).

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*minster Hall.* *Richardson, J.*, is more minute—"It has long been settled," he says, "that, if the Sheriff seize, after an act of bankruptcy, but before a commission, and *sells after it is issued*, the assignees may bring trover against him. In *Lyon v. Lamb* (which is another name for *Potter v. Starkie*), the Sheriff sold before any intimation that any act of bankruptcy had been committed, and it was insisted, that *that* distinguished it from *Cooper v. Chitty*; but the Court of *Exchequer* held that the property was changed, and vested in the assignees by relation from the time that the act was committed; so here, though the defendants might not have known a commission was about to issue at the time of the seizure, it forms no excuse for them for having *afterwards proceeded to a sale*." Now the utmost extent to which this case goes, and we are willing to allow it that extent, is, that it goes as far as *Potter v. Starkie* did, but then it is open to the observations to which that case was exposed, *viz.* that it was founded altogether upon *Cooper v. Chitty*; that none of the earlier cases were mentioned; that the distinction between the Sheriff and the execution-creditor was not noticed; and that the light reflected upon *Cooper v. Chitty* by *Aldridge v. Ireland*, was not brought under the attention of the Court.

The last case which we shall state at any length is *Price v. Helyar* (a). It was trover against the Sheriff, by the assignees of *Latham*. The levy was in *November, 1826*, and the money was paid to the execution-creditor in that month; there had been acts of bankruptcy in *August, September, and October*, but no commission issued until *11th January, 1827*; neither the Sheriff nor his officer knew of any act of bankruptcy, till *18th January, 1827*. For the assignees, no cases were cited on the point, but *Potter v. Starkie*, *Cooper v. Chitty*, and *Smith v. Milles*; the defendant cited no case,

(a) 4 Bing. 527; S. C. 2 Moore & P. 541, E. T. 1828.

except *Lee v. Lopez* (a); the Court took time to consider, and *Best*, C. J., delivered the opinion of the Court; he said they were desirous to inquire about *Potter v. Starkie*, and they found from Mr. Justice *Richardson*, that the report in 4 *M. & S.* was correct; that the Court of *Exchequer* did decide in the manner there stated, and gave the reason there assigned, *i. e.* that the case depended upon *Cooper v. Chitty*; and we think, said he, that *Cooper v. Chitty* embraces the principle on which we now decide. He then gives his reasons for considering the passage we have noticed in *Blackstone's Reports* as correct, and points out particular parts, even of the report in *Burrow*, which appear to him to justify the conclusion he adopts. We forbear examining his reasoning, because we have already fully detailed the grounds upon which our deduction from *Cooper v. Chitty* is founded; and that detail makes it unnecessary that we should comment upon any thing he has said; we will, however, make this observation, that we think it unfortunate the earlier cases were not brought under the consideration of the Court, and the distinction they establish between the officer and the execution-creditor pointed out, because we feel convinced the Court would have appreciated its weight, and we think it not improbable it might have led to a different conclusion.

The cases of *Carlisle v. Garland* (b), and *Dillon v. Lanley*, in the *King's Bench* (c), are, undoubtedly, additional authorities in support of the cases of *Potter v. Starkie*, *Laxarus v. Waithman*, and *Price v. Helyar*; but, as they are founded wholly upon those cases, and the distinction we have just mentioned was not adverted to in either of them, we think they do not carry with them the weight to which a deliberate judgment by either of those Courts, upon discussion and a full consideration of the subject, and a view of all the authorities, would deservedly be entitled.

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(a) 15 East, 280.

(b) 7 Bing. 298.

(c) 2 B. & Ad. 131.

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Upon the whole, therefore, upon the grounds that *Bailey v. Bunning*, *Letchmere v. Thorowgood*, and *Cole v. Davies*, establish a distinction between the case of the Sheriff and that of an execution-creditor; that that distinction is supported, not impugned, by *Cooper v. Chitty*; that it is mentioned with approbation in several cases, and not impeached in any; and that it was entirely overlooked in *Potter v. Starkie*, and the subsequent cases; we are of opinion that the defendant *Jewison* is entitled to the benefit of it in this case, and that, as to him, there ought to be judgment for the defendant.



### REEVES v. HUCKER.

An affidavit to hold to bail for money paid, &c. must allege that the money was paid, &c., at the request of the defendant.

An application to discharge a defendant out of custody for a defect in the affidavit to hold to bail, comes too late after bail above have been put in.

**ALEXANDER** moved to discharge the defendant out of custody on filing common bail, upon the ground that the affidavit to hold to bail, which was for use and occupation, money paid, &c., did not contain the words, "at his request." He stated that there were contrary decisions on this point in the *King's Bench* (a) and *Common Pleas* (b), the former Court holding the defect to be fatal, whilst the cases in the latter Court decided the contrary.

**BAYLEY, B.**—At a meeting of the Judges in the course of this term, it was their opinion that the decisions in the Court of *King's Bench* laid down the correct rule.

It appeared afterwards that bail above had been put in for the purpose of rendering the defendant; and—

(a) *Durnford v. Messiter*, 5 M. & S. 446; *Pitt v. New*, 3 Man. & Ryl. 129; S. C. 8 B. & C. 654. 5 Taunt. 756; *Brown v. Garnier*, 6 Taunt. 389, 2 Marsh, 83; *Berry v. Fernandes*, 1 Bing. 338; 8 B.

(b) *Eyre v. Hulton*, 5 Taunt. Moore, 332. 704, 1 Marsh, 315; *Bliss v. Atkins*,

*Per* BAYLEY, B.—There are many cases (*a*) which shew that after you have put in bail above you are too late to make an application of this nature.

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The rest of the Court concurred, and the rule was—

Refused.

(*a*) *Shawman v. Whalley*, 6 Taunt. 1 B. & P. 132; 7 T.R. 375; 1 M., 185; and see 1 East, 81; *Ibid.* 330; & S. 230.

### DOE v. ROE.

ON motion by *Wightman* for judgment against the casual ejector, the affidavit stated a service on *A. B.* and *C. D.*, tenants in possession, *as executors*.

An affidavit of service of a declaration in ejectment, upon "*A. B.* and *C. D.*, tenants in possession, *as executors*," is insufficient.

BAYLEY, B.—Why is it not said, "tenants in possession" merely? The rule is, that the tenants in possession must be served. Here are introduced certain qualifying words which induce a doubt. On an indictment for perjury, it might be said that the possession of one was the possession of both. It is a qualification. The affidavit must be amended.

Rule refused.

### BOWSER and Others v. AUSTEN.

CHILTON moved for a *distringas* upon an affidavit which did not state where the residence of the defendant was, at which the deponent attempted to serve him.

The affidavit for a *distringas* must state where the residence of the defendant is situated.

[*Bayley*, B.—You ought to state where the residence of the defendant is. He may have resided in one street, and have removed to another. The party who attempted to serve the defendant at his dwelling-house, must know where

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he went, and ought to state to the Court where the defendant resided when he attempted to serve him.

Lord *Lyndhurst*, C. B.—This point was expressly decided in the case of *Pitt v. Eldred* (a).]

That case is also reported by Mr. *Tyrwhitt* (b), in which report the judgment of Mr. Baron *Bayley* is given at length, and the point now in question is not adverted to. Indeed, it would seem unnecessary to tell the defendant where his residence is.

LORD LYNDHURST, C. B.—In the report of the case of *Pitt v. Eldred*, by Messrs. *Crompton* and *Jervis*, it is distinctly stated that the Master certified that the affidavit must state where the residence of the defendant is, and that the Court adopted and acted upon that certificate. The reporters cannot have been mistaken in that respect, and the Master now confirms their report. It is of importance that the practice in these cases should be strictly adhered to.

BAYLEY, B.—It is desirable that the Court should look strictly to these cases. The affidavit may easily be amended.

GARROW, B.—We ought rather to adhere to the rules which have been clearly laid down, than seek for reasons for departing from them.

Rule refused.

(a) 1 C. & J. 147.

(b) 1 Tyrwh. 123.

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## ALLEN v. MILNER.

**INDEBITATUS** *assumpsit* for 150*l.* for turnpike tolls. —Plea, *actio. non*, because, after the making of the promise and undertaking, and before the day of the exhibiting the bill of the said plaintiff, to wit, on the 26th day of *September*, 1829, in the county &c., differences having arisen and being depending between the plaintiff and the defendant, they mutually submitted themselves to refer, and did then and there refer the said matter in difference to the arbitration of *W. H.* and *T. F.*; and in case they should not agree, then to the umpirage of *T. P.*, and the decision of the umpire to be final; and the defendant averred that, afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in consideration that the said defendant had then and there undertaken and faithfully promised the plaintiff to perform and fulfil all things in the said submission contained; and in the said award or umpirage to be contained on the part of the defendant to be performed and fulfilled, he the said plaintiff undertook and then and there faithfully promised the defendant to perform and fulfil all things in the said submission contained, and in the said award or umpirage to be contained on his the said plaintiff's part to be performed and fulfilled; and the defendant further said, that the said arbitrators not having agreed upon the matter so referred to them, the said umpire thereupon in due time, to wit, on the 24th *October*, in the year aforesaid, in the county aforesaid, took upon himself the burthen of the said arbitration and umpirage, and having duly examined and considered the said subject-matter in difference between the plaintiff and defendant, the said umpire did make his award and umpirage in writing, under his hand, of and concerning the premises, and did thereby then and there award and declare that the defendant should pay the plaintiff the sum

Arbitrament without performance is no answer to an action for a *debt*, where the amount only of such debt is referred, and the award merely ascertains the amount, and directs that it shall be paid in money.

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of 13*l.*, as by the said award, reference being thereunto had, will more fully appear; and this the defendant is ready to verify, &c.

Special demurrer, stating the following causes of demurrer:—that the defendant hath not in and by his said plea shewn performance of the said award by the payment by him the defendant to the plaintiff of the said sum of 13*l.* in that plea mentioned; and that defendant hath not shewn satisfaction for the non-performance of the said promise and undertaking; and that the plea amounts to accord only without satisfaction, and is in other respects defective, uncertain, informal, and insufficient, &c. Joinder in demurrer.

*Cowling*, for plaintiff.—The plea is one of confession and avoidance, *per Denison, J.*, in *Addersley v. Evans* (a), and, therefore, admits 50*l.* to be still due to the plaintiff. The question, therefore, is, whether a plea that a smaller sum than is due has been awarded to be paid is a good defence, even without payment of that smaller sum. First, taking the case in the way most favourable to the defendant, that the award amounts to a final decision that the 13*l.* only is due, and then the plaintiff is concluded by it from claiming more, the plea would be bad even if it had averred payment of that sum. The case is then the same as if the plaintiff had declared for 13*l.* only. Now, the reference is only of the plaintiff's claim, that is, its amount; the umpire was, therefore, more properly an accountant than an arbitrator; he had only to inquire whether 50*l.*, or what sum, was due to the plaintiff; he had no power, nor does he profess, to award interest, or the like, by way of damages for the time during which the debt had been due. The plea would, therefore, amount only to payment on a certain day of a certain sum due long before. Such a

(a) 1 *Ld. Ken.* 250.

plea would have been good if pleaded by way of payment, but is bad if pleaded by way of accord and satisfaction; since, *per Holroyd, J.*, in *Francis v. Crywell* (a), it was decided in *Perry v. Odingsell* (b), that payment after the day is good by way of discharge but not of satisfaction. At all events, the money not having been paid, the plea is bad. An averment that the same sum which the plaintiff claims has actually been decided to be due by the umpire, who has examined into the claim, can be no reason for not paying it. The award gives the plaintiff nothing for the detention of his debt, nor any advantage that he had not before. Satisfaction is as necessary under an award as accord. "An accord must appear to be advantageous to the party, otherwise it can be no satisfaction; therefore, in an action of trespass for taking the plaintiff's cattle, it is no good plea to say that there was an accord that the plaintiff should have his cattle again, for this is not any satisfaction" (c). In actions for unliquidated damages the case is different; there is there no detention of any specific sum for a certain time, and a reference of the claim must there include every thing; and there is, therefore, an equivalent for the plaintiff's being barred of his right of action. Besides this, the plea is pleaded to the whole sum of 50l.; it ought to have been pleaded to 13l. of it only, and the general issue to the residue. *Thomas v. Heathorn* (d).

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*Chilton* for the defendant.—The sum awarded includes the amount, and damages for the detention of it. It is incorrect to say, that the amount was liquidated; for the plea says, that differences had arisen respecting it. The plaintiff is concluded from claiming, in any shape, more than the sum awarded; and there is good reason for it—each party en-

(a) 5 B. & A. 888.

(b) 4 Mod. 250.

(c) Bac. Abr. *Accord*, (A.)

(d) 2 B. & C. 477; 3 D. & R. 647.

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tered into mutual promises to abide by the award, and the plaintiff can have a remedy for the 13*l.* upon the award itself. An award differs materially from an accord; it is in the nature of a judgment, and is therefore final. All the cases on this subject were considered in *Gascoyne v. Edwards* (a), which settled conclusively, that an award is a bar to an action for the original demand, even though unperformed after the time for performance has expired. That case is precisely in point; *Freeman v. Bernard* (b), is to the same effect; so also is *Crofts v. Harris* (c), in which one count was for wares sold and delivered.

*Cowling*, in reply.—*Gascoyne v. Edwards* was a case of unliquidated damages. In *Crofts v. Harris*, all matters in dispute between the parties were referred, which included damages for the detention of the debt, as well as the debt itself. The award only suspends the right of action, which revives on non-performance of the award. It is like a debtor making a composition with his creditors—they cannot sue him so long as he performs his agreement, but if he breaks it, they are remitted to their original rights. *Cramley v. Hillary* (d).

*Cur. adv. vult.*

LORD LYNTHURST, now delivered the judgment of the Court.

This was an action of *indebitatus assumpsit*, for tolls, &c. The defendant pleaded, as to the count for tolls, that differences had arisen between him and the plaintiff, touching the said claim, and that they mutually submitted themselves to refer, and did refer, the said matter in difference to arbitration; that they mutually promised to abide by the award; and that the umpire made his award of and concerning the said premises, and did thereby award, that the

(a) 1 Y. & J. 19.

(b) Salk. 69.

(c) Carth. 187

(d) 2 M. & S. 120.

defendant should pay to the plaintiff the sum of 13*l.* To this plea, the plaintiff demurred specially, because the plaintiff did not aver payment of the 13*l.*, or any other satisfaction of the plaintiff's demand. The question, therefore, is, whether this award is, of itself, without payment or satisfaction, any bar; and considering the nature of the plaintiff's demand, and the nature of the award, we are of opinion that it is not. The plaintiff's demand is for a debt, and the award is not for the performance of any *collateral* act, but for the payment of money. The matter, therefore, for the consideration of the arbitrator was, whether there were any, and what debt; the award only ascertains that there is a debt, specifies the amount, and directs the payment; but the money, till paid, is due in respect of the original debt, *i. e.* for tolls; its character remains the same, nothing is done to vary its nature or destroy its original quality. Had the demand been of a different description, as for the delivery of goods, and the award had directed a payment of money in satisfaction of the demand, it might then have been said that the award had changed the nature of the original demand, that the right to have the goods was gone, and the only right remaining was the substituted right, *i. e.* the right to have the money; or, had the demand been for a debt, and the award had directed not payment in money, but payment in a collateral way, as by delivery of goods, performance of work, &c., it might, perhaps, have been said, that the right to have payment in money was gone; but here the 13*l.* is to be paid for the original demand, *i. e.* for the tolls, and it is to be paid as that demand was to have been paid, *i. e.* in money. In the case of *Crofts v. Harris* (a), the declaration contained three counts: one, for not shipping and consigning cotton wool; one, upon an *indebitatus* for goods sold, with a conditional promise to pay in money, if the de-

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fendant did not ship and consign cotton wool to the plaintiff; and the third, upon a general *indebitatus assumpsit*, for goods sold; the defendant pleaded a submission of all matters, and an award thereon, which he set out, but he did not allege performance on his part; what the matter awarded was, whether the payment of money, or the performance of any other matter, does not appear. It turned out on demurrer, that the award related only to the cotton-wool, not to the other matters; so that it was pleaded to what it could not bar, and, as to the cotton-wool, it was conditional only, and therefore void. The plaintiff, therefore, had judgment. But, *Carthew* says, the following diversities were taken by the Court to be law:—*First*, That an award without performance is a good bar to an action *on the case*, if the parties have mutual remedies against each other, to compel the execution of the matters awarded; and (after other two positions, not bearing upon this case), that if the award in that case had been general, the defendant might have pleaded it in bar of all the promises in the declaration, and it would not have amounted to the general issue. In this case, therefore, there was no decision upon the point. The position, that an award without performance would be a good bar to *an action upon the case*, would be within the distinction we have taken, if by *an action on the case* were meant, as it probably was, not an action for a debt, but a special action on the case for damages; and, as we are not apprized what the award there was, it does not follow, that, because the award in that case would have been a good bar, the award here, which is only an award of payment, is. In *Allen v. Harris* (a), relied upon in *Gascoyne v. Edwards*, it is certainly said by counsel, *arguendo*, that arbitrament may be pleaded without performance, because the parties may have reciprocal remedies, and the Court is represented to have said, that “if ar-

(a) Ld. Raym. 122.

bitrament be with mutual promises to perform it, though the party has not performed his part, who brings the action, yet shall he maintain his action, because an arbitrament is like a judgment, and the party may have his remedy upon it." But this was not the point in judgment before the Court, the defendant had pleaded not an arbitrament, but an accord, which was held bad; and the action was not an action for a debt, but an action of trover. The case of *Gascoyne v. Edwards* (a) admits (if not of both the answers we have mentioned) clearly of the first, *viz.* that the demand was for general damages, and not for a debt. The first count of the declaration, we have ascertained from the pleadings, was covenant for not repairing; the award was pleaded to that count only, and it directed the payment of 5*l.* for damages, the repair of the premises, and the quitting them at a given period. That case, therefore, according to the distinction we have taken, does not govern the present, because the action there was not for a debt, but for general damages for not repairing. Upon the ground, therefore, that the present action is for a debt, that the award only ascertains the amount of that debt, and that the money payable under the award is nothing but the original debt so ascertained in amount, we are of opinion that this plea is bad, and that the plaintiff is entitled to judgment.

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Judgment for the plaintiff.

(a) 1 Younge & Jervis, 19.

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WHITEHEAD v. MINN.

Where the agent for the defendant had not time to communicate with his principal in the country, so as to obtain the names of good bail, the Court allowed the bail to be changed upon payment of costs, and putting the plaintiff in the same situation as if good bail had been put in in the first instance.

**ALEXANDER** applied under the rule of Court, *Trinity* Term, 1 *W.* 4 (a), to be at liberty to change the bail in this case. The ground of his application, supported by affidavit, was, that the agent for the defendant had not had time to communicate with his principal in the country, so as to obtain the names of good bail; and was therefore obliged to put in bail who were insufficient.

**BAYLEY, B.**—This rule of Court was framed after much consideration, with a view to secure, in the first instance, the sufficiency of bail put in for defendants; and this application is made after the rule was known to be in force. However, as this is the first application under the rule, and some excuse is offered, you may take a rule to shew cause, upon an undertaking to pay the costs occasioned by putting in insufficient bail, and placing the plaintiff in the same situation as if good bail had been put in in the first instance.

No cause was shewn against the rule.

(a) *Ante*, Vol. 1, p. 470, pl. 5.

It is not necessary to state in the notice of bail, that the bail have resided for the last six months at the places of residence described in the notice.

FENTON v. WARRE.

**JOHN JERVIS** objected that the notice of bail in this case did not state that the bail had respectively resided at their places of residence, described in the notice, for the last six months, according to the rule of Court, *Trinity* Term, 1 *W.* 4 (a).

(a) *Ante*, Vol. 1, p. 470, pl. 2.

**BAYLEY, B.**—It is not necessary that the notice should state that; because it must be assumed, until the contrary appears, that the bail have resided at their places of residence described, for the last six months. If the fact be otherwise, the plaintiff may raise the objection by affidavit.

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*Price, for the bail (a).*

(a) The same objection was taken by *Clarkson* and by *Addison* during the term, and was similarly disposed of. In the *King's Bench*, however, it was decided by

*Littledale, J.*, that the notice of bail must state that the bail resided for the last six months at their places of residence mentioned in the notice.

#### WILLIAMS v. WILLIAMS.

**I**N *March*, 1823, the defendant signed a *cognovit* at the foot of a *concessit solvere*. On the 10th *October*, 1830, the day before the *Welsh* jurisdiction expired, the plaintiff issued a *queritur*, tested as of the then last preceding Great Sessions for *Carnarvonshire*, which was not served; signed judgment; and removed the proceedings into this Court. The plaintiff subsequently issued execution, and the defendant paid the amount into the hands of the Sheriff of *Carnarvonshire*. A rule having been obtained, calling upon the plaintiff to shew cause why the judgment and execution should not be set aside, and the money refunded, with costs, it was sworn for the plaintiff, that the defendant had been served with a new rule (a) before the

In *March*, 1823, the defendant, having been served with a new rule in *Carnarvonshire*, signed a *cognovit* at the foot of a *concessit solvere*; in *October*, 1830, the plaintiff issued a *queritur*, which was not served, signed judgment and removed the proceedings into this Court; afterwards the plaintiff took out a summons to issue execu-

tion, which, with a notice to tax costs, was served upon the defendant; the defendant did not attend the summons or taxation of costs, but prayed time to pay the debt:—*Held*, that the judgment was regular according to the practice of the late Court of Great Sessions, and that the plaintiff, by his subsequent conduct, would have waived any irregularity in the judgment.

(a) See the form 3 Y. & J. 207, n.

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*cognovit* was given, and that it had been the uniform practice for many years in the Great Sessions for *Carnarvonshire* to take *cognovits* after defendants had been served with new rules; and that judgments signed upon such *cognovits* had been decided by the Judges of that Court to be regular. It appeared, also, that, after the judgment had been signed, and the proceedings removed into this Court, the defendant had been served with a summons to shew cause why execution should not issue, and also with a notice to attend the taxation of costs; to neither of which he had appeared, but had requested time to pay the amount.

*R. V. Richards* shewed cause.—If this *cognovit* had been given in the superior Courts, it may be conceded that it could not have been supported, because, at the time it was signed, no writ had been issued. By the practice of the Great Sessions, however, as deposed to, the new rule is a sufficient commencement of an action for this purpose, although it may not be legally the commencement of an action for other purposes. *Phillips v. Williams (a)*. By the act of Parliament, this Court is in the situation of the Court of Great Sessions in this particular case, and ought not to set aside these proceedings, if in that Court they would have been supported. Now, it is clear that, according to the practice of that Court, the proceedings are regular, and, if discussed in that Court, this rule would, according to the affidavits, have been discharged.

But, independently of this question, if there be irregularity, it has been waived by the defendant. He had notice of the judgment by service of the summons, and notice to tax the costs, and, instead of pointing out the irregularity, he suffered the plaintiff to proceed, and even prayed for time to pay the debt.

(a) 3 Y. & J. 207.

*John Jervis* in support of the rule.—Upon advert-  
 ing to the origin and object of the new rule, it will be clear that it  
 is not a sufficient commencement of the action to support  
 the *cognovit*. In consequence of the summary proceed-  
 ing in the Great Sessions it was necessary, that some fur-  
 ther notice should be given to the defendant than he could  
 collect from the *queritur* alone; and, therefore, the new  
 rule, which informed the defendant that the action was  
 commenced, and explained to him the nature of the demand,  
 and the amount claimed, was adopted. This was found in  
 many cases to be a cheap mode of obtaining the demand;  
 and, therefore, the new rule was generally the first step in  
 an action, but never could the action legally proceed with-  
 out the issuing of a *queritur*, founded upon a supposed  
 original, which was the only legal commencement of an  
 action. In fact, the new rule is only a notice of action, like  
 a notice to a constable or a magistrate, and has been de-  
 cided, in the case of *Phillips v. Williams*, not to be the  
 commencement of an action. Now, if the new rule be not  
 the commencement of an action, it being clear that the  
 action must be commenced before the *cognovit* is given,  
 the affidavits of practice, which are *ex parte*, are entitled  
 to no weight. But, these affidavits studiously avoid the  
 real question in the case, because here the *queritur* is *tested*  
 long after the *cognovit* is given, and they do not state that  
 where a *cognovit* is given upon a new rule, and a *queritur* is  
 subsequently issued, that *queritur* is not tested before the  
 date of the *cognovit*. If a writ of error were brought upon  
 this judgment for the want of an original writ, no original  
 could now be issued to support this judgment.

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BAYLEY, B.—I am of opinion that this rule should be  
 discharged. We are placed in the situation in which the  
 Court of Great Sessions would have been but for the recent  
 act of Parliament; and if the proceedings would have been  
 regular in that Court, we are bound here to consider that

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they are regular. In *March*, 1823, a common *concessit solvere* was subscribed by the defendant as follows:—"I acknowledge this action." At that period there was no proceeding in the cause but the new rule, the form of which is:—"This is to give you notice that an action is commenced, and will be prosecuted against you at the next Great Sessions, to be holden, &c., by *A. B.*, for the sum of £——, due from you to him, for &c., and that the said plaintiff will proceed to trial at the said next Great Sessions, to which said action you may appear, and make your defence, if you think proper." The case of *Phillips v. Williams* has decided, that the new rule is not the legal commencement of an action, so as to enable an attorney to insist on being paid his expenses in the suit, because a new rule has been sued out before the money was paid; and, therefore, that it is not to be considered to be in the nature of process in those Courts. Still, however, those Courts must have considered it to be a proceeding in the cause, for otherwise the service of the new rule would not have been allowed in costs. Now, at the time when this *cognovit* was given, no suit was properly commenced. The new rule only was served; and if, according to the practice of the Court, which knew the effect of this proceeding, it would have been considered so far a proceeding in the cause as to justify the plaintiff in taking a *cognovit*, and afterwards entering up judgment upon a *queritur* entered as of the time when the judgment is signed—that does not appear to me to militate against any known rule or principle of law. That this is the nature of the new rule abundantly appears from the affidavits. There is no foundation for saying that there is any impropriety in allowing a judgment to be entered up on a *queritur* subsequently issued. To issue an original would only be complying with a technical rule; and if it would have been so considered by the late Court, we who are placed in the situation of that Court are not authorized to take a different view of the subject. The affidavits for

the defendant do not impeach or contradict the existence of this practice; but it is put by the counsel for the defendant as a pure principle of law, while the affidavits for the plaintiff shew this judgment to be according to the settled practice of the late Courts. In point of law I can see no objection to entering up judgment on this *cognovit*; because I consider that, when connected with the practice upon the new rule, the language of the *cognovit* is a sufficient authority. I am, therefore, of opinion that this judgment was regularly entered up. The justice is clearly in favour of the plaintiff.

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I think, also, that, by the summons calling on the defendant to shew cause why execution should not issue, he was distinctly apprized of the existence of the judgment; and if, instead of applying to this Court, he allowed the plaintiff to proceed, he thereby would have waived any irregularity. But I think that the judgment is regular, and that this rule must be discharged.

GARROW, B., concurred.

VAUGHAN, B.—It appears to me, upon looking at the affidavits, and we have no other means of obtaining information upon the subject, that this judgment was according to the practice of the late Court of Great Sessions, and regular.

BOLLAND, B.—I perfectly agree with the rest of the Court. We are sitting here in the situation of the late Court, and are bound by what is sworn to be the regular course of that Court.

Rule discharged, with costs.

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### HALTON v. STOCKING.

Where, a rule *nisi* having been obtained to set aside an attachment for irregularity, the defendant's attorney offered to waive the proceedings and pay the costs; notwithstanding which the rule was persisted in, the Court made the rule absolute, with costs up to the time of the offer, the plaintiff's attorney to pay the costs subsequently incurred.

**ON** shewing cause against a rule to set aside an attachment for irregularity—

*Steer* admitted the irregularity, but produced an affidavit, which stated, that, after the rule *nisi* had been obtained, the defendant's attorney had offered to waive the proceedings, and pay the costs; notwithstanding which the rule was persisted in. He cited *Beeston v. Beckett (a)*, to shew that, under such circumstances, the Court would require the party who applied for the rule to pay the costs incurred subsequently to the offer.

*Thesiger* for the rule.

*Per Curiam*.—The rule must be absolute; the defendant to pay the costs incurred up to the time when the offer was made, and the *attorney* for the plaintiff to pay the costs subsequently incurred.

Rule accordingly.

(a) 4 M. & R. 100.

### SCOTT v. MARSHALL.

After the day mentioned in the rule no cause can be shewn against a rule *nisi* for costs of the day.

**ON** the 14th November, *Watson* proposed to shew cause against a rule *nisi* for costs of the day, which had been obtained by *Burchell*, and was drawn up for the 8th November.

Lord LYNDHURST, C. B.—This is a rule *nisi*, which is absolute without further motion, unless cause be shewn on or before the day mentioned in the rule. You are too late, the rule is

Absolute.

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## BEALY v. GREENSLADE.

*ASSUMPSIT* upon a promissory note, dated 31st March, 1817, for 30*l.* with interest. Pleas—*non assumpsit*; *actio non accrevit infra sex annos*. Issues thereon.

The payment, within six years, of interest due upon a note beyond six years, where the note remains in the hands of the payee, is sufficient to take the case out of the statute of limitations.

At the trial, before *Alderson, J.*, at the last Summer assizes for *Somerset*, the plaintiff, to take the case out of the statute of limitations, called a witness of the name of *Vesey*, who proved, that on the 16th January, 1826, by the direction of the defendant, he paid the plaintiff 6*l.* for interest, and had subsequently been allowed that sum by the defendant out of his rent. The witness did not know at what time the interest, for which he paid the 6*l.*, was due; but, upon the production of the note, there appeared in the handwriting of the plaintiff, after other receipts for interest, the following indorsement:—

“January 16, 1826. Received of *W. Greenslade*, by payment of *Humphrey Vesey*, 6*l.*, being four years interest due on this note, on the 31st day of March, 1824.

*Thomas Bealy.*”

Upon this evidence, it was contended for the defendant, that a payment within six years of interest due before, was not sufficient to take the case out of the statute; and that the presumption was, that the principal had been paid, and that a portion only of the interest remained due, which had been subsequently satisfied. *Sanders v. Meredith* (a). The learned Judge saved the point, and the plaintiff had a verdict.

In *Easter Term*, *Follett* obtained a rule *nisi* to enter a nonsuit; against which—

*Rogers* shewed cause.—This case is expressly except-

(a) 3 M. & R. 116, per *Parke, J.*

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ed out of the operation of the statute 9 *Geo.* 4, c. 14, by the proviso; and the only question is, whether a payment within six years of interest due before that time is sufficient to take the case out of the statute of limitations. In *Sanders v. Meredith*, the question was upon a bond, and the point was, payment being presumed after twenty years, whether, under the circumstances of that case, the bond could be considered as a subsisting security. This, however, is upon a note; and the question is, whether there is an acknowledgment of the debt within six years. The principle upon which an acknowledgment has been held to be an answer to the statute of limitations in actions of *assumpsit* was laid down by Lord *Ellenborough* in *Hurst v. Parker* (a), and was said by Lord *Tenterden*, in *Tanner v. Smart* (b), after an examination of all the cases, to be, that "an acknowledgment is evidence of a new promise, and, as such, constitutes a new cause of action, and supports and establishes the promises which the declaration states." Thus, a part payment of the principal by one of several parties to a joint and several promissory note, operates as a new promise, because it is an admission that the note is unsatisfied. *Whitcomb v. Whiting* (c), *Burleigh v. Stott* (d). So, here, the payment of interest in 1826 operates so as to reproduce the original liability. In fact, the only way in which this case can properly be viewed, is upon the effect of the evidence; and, in that view of the case, it is said, that the presumption is, that the principal had been paid, and the interest was the only sum which remained unsatisfied. But the regular indorsement of interest received, and the circumstance of the note still remaining in the hands of the payee, *Sanders v. Meredith*, are, if we are to argue upon the effect of the evidence, conclusive

(a) 1 B. & A. 92.

(c) Dougl. 651.

(b) 6 B. & C. 603, 606; 9 D. &  
R. 549.

(d) 8 B. & C. 36; 2 M. & R. 93.

that the note had not been satisfied. The indorsements of interest are entries against the plaintiff's interest, and each shews a continuance of the account. *Catling v. Skoulding* (a). Independently of the indorsement upon the note, the payment amounts to a general acknowledgment, because the payment was not limited to the by-gone interest, and the note was not demanded at the time. He also cited *Bryan v. Horseman* (b) and *Willis v. Newham* (c).

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*Butt*, in support of the rule.—*Whitcomb v. Whiting*, *Burleigh v. Stott*, and *Pease v. Hirst* (d), were cases in which the sum paid had accrued within six years, and therefore do not apply to this case, which, in principle, is quite new. It is perfectly consistent with the state of facts in this case, that the principal had been paid, and the interest only remained due; the payment of the interest, therefore, would not take the case out of the statute, so far as regards the principal. In *Collyer v. Willock* (e), the debt was composed of principal and interest, and the defendant tendered the principal, which he afterwards paid into Court, but refused to pay the interest; the Court held, that the payment of the principal did not take the case out of the statute of limitations, so far as regarded the claim for interest, observing that the payment of the principal did not raise an implied promise to pay the interest. It appears, therefore, that the principal and interest may be severed, and the payment in respect of one does not necessarily imply that the other is still due. That case, therefore, is an authority for the defendant, and the facts are consistent with the supposition, because no claim was made for interest due after 1824. Upon this part of the case *Sanders v. Meredith* is in point. It is true, that

(a) 6 T. R. 189.

(b) 4 East, 599.

(c) 3 Y & J 516.

(d) 10 B & C. 122.

(e) 4 Bingh. 313.

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case was on a bond, and this on a note; but there is no legal distinction for this purpose between the two securities. The bond was not given up, and yet *Parke, J.*, says: "payment within twenty years of interest, which has accrued beyond the twenty years, is only proof that such a bond once existed."

LORD LYNTHURST, C. B.—The debt in this case is composed of principal and interest, and a payment of interest is consequently a payment of a part of the debt; which, having been made within the period of six years, and being coupled with the circumstance of the note remaining in the hands of the payee, is, I think, sufficient to take this case out of the statute of limitations. I am, therefore, of opinion that the verdict ought not to be disturbed.

BAYLEY, B.—I am of the same opinion. The proviso takes this case out of the operation of the statute 9 *Geo. 4*, c. 14; but the language of that statute seems to me to be important upon this question. It is this, "provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or *interest* made by any person whatsoever." The question therefore turns upon the effect of this payment made within six years, in respect of interest due before that time. Now, it may be a question for the consideration of a Jury, what is the fair effect of such a payment; but if the payment be made, under circumstances like the present, it is impossible to say that the payment is not a payment in respect of interest upon a debt at the time undischarged. The debt here arose upon a promissory note: the defendant sends to the plaintiff, and directs his tenant to make a particular payment, and afterwards he is apprized that such payment is made. If at that time the principal had been paid, what in common prudence would the defendant have done? When he was directing his tenant to make

the payment, he would have desired him to obtain the note, or, when he saw him afterwards, would have asked him if he had the note, and, upon his answering in the negative, would have desired him to get it, or would have applied for it himself. Therefore, as it seems to me, this payment, accompanied with the circumstances of there being no demand of the note, and no complaint that the note was not sent to him, does amount to an acknowledgment that, at the time of the payment, the principal was a continuing subsisting debt, and is sufficient to take this case out of the statute of limitations.

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GARROW, B., was of the same opinion.

BOLLAND, B.—I think that this verdict ought not to be disturbed. I agree that this question is not touched by the late act of Parliament, and that we must view it upon the law as it stood before that statute. In 1817, the plaintiff accommodated the defendant with a sum of money, for which this note was given; and it appears that interest was regularly paid until 1820. In 1826, a payment was made in respect of interest due up to the year 1824, which payment was considered by the plaintiff to be for interest, and was so appropriated by him, contradistinguishing it from the principal due upon the note. Now, if this loan had been made by a person who had pressed the creditor, though not to the full extent of arresting him, or if the principal had been paid by instalments, the holder of the note would have applied the payment to the principal, and the payments of the principal would have been written off upon the note. The note is not cancelled or given up, and there appears to be no indorsement of the payment of the principal upon the note. On the contrary, the note remains in the hands of the payee, and, in 1826, a sum is paid for interest due in 1824. These circumstances appear to me to raise the fair presumption that the note was not paid; and I think that

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payment of part of the entire debt, composed of principal and interest, in 1826, was sufficient to take the case out of the statute of limitations.

Rule discharged.

POOLE v. POOLE.

In February, 1816, a marriage took place between two minors by licence, without consent. They cohabited until June, 1816, when, from the misconduct of the husband, he was obliged to leave the house where they had been residing. They then lived separate until October, 1817, when the husband died. After the separation, in June, 1816, he, on various occasions, insisted that she was not his lawful wife, and gave that as a reason for not living with her again. There was some slight evidence of small sums supplied to the wife being allowed in the rent of a farm held under the husband, but under what circumstances did not appear:

—*Held*, that these parties did not live together as man and wife until the death of the husband, within the meaning of 3 Geo. 4, c. 75, s. 2.

**BILL** for dower. Plea, *ne unques accouple*. Issue.

The parties entered into evidence, and the question was upon the validity of the marriage.

Lord *Lyndhurst*, C. B., on account of the importance of the subject, directed the point to be argued before the full Court; and, accordingly, it was argued in this term, by *Simpkinson* and *Skirrow*, for the plaintiff; and *Jervis* and *Lovatt*, for the defendant.

The Court took time to consider. The facts and arguments were fully stated in the judgment of the Court, which was now delivered by—

LORD LYNDBURST, C. B.—This is a case arising out of the act of 3 Geo. 4, c. 75. That statute recites the marriage act passed in the reign of *George* the 2nd (a), and in the recital refers to the provisions of that act relative to the marriage of minors without the consent of their parents or guardians, and goes on to say, that great evil and injustice had arisen from those provisions of the act, to which I have referred. The act of the 3 Geo. 4 substitutes new regulations upon that subject, that is, new regulations with respect to marriages thereafter to be solemnized. The 2nd section, however, refers also to marriages

(a) 26 Geo. 2, c. 33.

which had then taken place, and enacts that, notwithstanding any thing in that act, such marriages should be considered valid under certain circumstances, amongst others, where the parties have continued to live together as man and wife, up to the time of the death of one of them, or up to the passing of the act; and the question, therefore, in this case will be, whether, within the meaning of this act of Parliament, *Thomas Poole* and *Anne Poole*, with whom he intermarried, did continue to live together as man and wife up to the time of the death of *Thomas Poole*. Now, the facts of the case are shortly these:—*Thomas* and *Ann Poole* were married in the month of *February*, 1816; they were both of them at that time under age. The licence was obtained upon an affidavit by *Thomas Poole*, the husband, swearing that they were both of age; after the marriage, they continued to live together in the house of a person of the name of *Lewis*, for a few weeks; and afterwards they moved to the house of a person of the name of *Robinson*, where they continued to live together till the 6th of *June*, in the year 1816. The conduct of *Thomas Poole*, the husband, was so irregular, that Mr. *Robinson*, the owner of the house, desired him to quit it; he accordingly left the house, his wife remaining there. He went and resided for a short time at a public house called the *Three Tuns*, and afterwards went to the *Talbot Inn*, where he continued separate from his wife, till *October* in the following year. He then went for three or four weeks to the house of his uncle, where he died, in the month of *October*, 1817, having been absent from his wife for a period of about seventeen months. It does not appear, that, during the whole of this period, he ever saw her; and, from the evidence of several of the witnesses, it appears that he continually insisted that she was not his lawful wife. He told *Lewis*, on his application on her behalf, that he would never live with her again, that she was not his lawful wife. He stated the same thing precisely to

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another witness of the name of *Hancock*, always insisting that she was not his lawful wife, and that he would never live with her again. The same fact is established by a letter written very recently after he had left her. On the 26th *June*, he addressed a letter to her, in consequence of some application, which appeared to have been made to him on her behalf, in which he says, that if she does not cease to trouble him, he will advertize that she is not his lawful wife, and will caution all persons not to trust her. It appears therefore, that he is separated from her, in consequence of his being turned out of the house by Mr. *Robinson*, by reason of his misconduct; that he almost immediately afterwards refused to live with her, declaring that she was not his lawful wife, and giving that as one of his reasons for refusing to live with her. It appears to me, under these circumstances, that it is impossible, in any view of the case, or in any contemplation of the meaning of the act of Parliament, to consider that these persons were living together as man and wife, at the period to which I have referred—the period of his death. But a case has been cited, the case of *King v. Sansom* (a), which was decided by Sir *Christopher Robinson*, in the Consistory Court, and afterwards confirmed, on appeal to Sir *John Nichol*. In that case the marriage was invalid under the operation of the statute of *Geo. 2*, but the parties separated by agreement, and not only separated by agreement, but a separate maintenance by bond was given by the husband to the wife; and the Judge of the Consistory Court (whose judgment was afterwards confirmed on appeal) was of opinion that, though in point of fact they were not actually living together at the time when the act of Parliament passed, yet they must, in legal construction, be considered as living together. It appears to me, however, that the circumstances of that case are widely different from

(a) 3 Addams, 277.

the present, and that none of the grounds on which that judgment was pronounced, as stated in the report of the case, exist in the present. The grounds upon which the learned Judge relies are these: he says—"the actual separation of the parties in this case was without any reference, apparently, to doubts entertained by both or either as to the legal validity of their marriage." In this case, it is true, the original separation appears not to have arisen from any doubt with respect to the validity of their marriage; but almost immediately afterwards, within two or three weeks at the utmost, and from that period up to the time of the death of *Thomas Poole*, the invalidity of the marriage was insisted upon as a reason why they should continue to live separate. The ground, therefore, upon which, in that case, the learned Judge relied, and to which I have referred, does not exist in this case, but directly the reverse. The learned Judge goes on and says—"on the contrary, they separate by virtue, to some extent, of a deed in which the party proceeded against is expressly recognised as the wife of the party proceeding in this suit, and by which a separate maintenance is provided for her expressly in that character:" so that there, in the very instrument in which future provision is secured to her, she is stiled the wife of the other party; she is supported and provided for by a deed of separate maintenance, an instrument of a character peculiar to the case of husband and wife. It appears to me, therefore, that the circumstances of that case are widely different from the present, and that none of the grounds on which that judgment proceeded exist in this case. One fact, however, has been relied upon, to which it is material that I should advert, which is this, that, during their separation, the overseers of the parish appear to have been applied to by Mrs. *Poole* for relief, and relief was afforded her to the amount in the whole of about 2*l.* 12*s.* 6*d.* That sum of 2*l.* 12*s.* 6*d.* was reimbursed to the overseers by a person of the name

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of *Bristow*. A warrant had been issued to apprehend *Thomas Poole*; *Thomas Poole* was drunk when the officer came to him; he threatened the officer; the money was paid by *Bristow*. It appears that, afterwards, *Bristow* continued to supply the woman with money, at the rate of about 4s. a-week, making, with the sum reimbursed to the overseers, a sum of about 6*l.* *Bristow*, however, does not pretend to say that this was done at the instance or desire of *Thomas Poole*. He says, that it was at the desire of *Thomas Poole*, or *James Poole*, but he cannot undertake to say which. There is this fact, however, that this sum was ultimately allowed to *Bristow*, in this way: *Bristow's* mother rented a small farm under *Thomas Poole*; *Bristow* had the management of that farm, and he was allowed to deduct the 6*l.* out of the rent due from the grandmother; but under what circumstances, whether in consequence of any communication with *Thomas Poole*, or, if so, at what period, does not appear. I think these circumstances are too slight to overbalance the rest of the case; and I am of opinion, therefore, and my learned Brothers concur in that opinion, that these parties cannot, within any fair construction of this act of Parliament, be considered as having lived together as man and wife, up to the period of *Thomas Poole's* death, and consequently that this bill must be dismissed.

Bill dismissed, with costs (a).

(a) See *R. v. Inhab. of St. John Maria Wantley*, Moody's C. C. *Delpike*, 2 B. & Ad. 226; *R. v.* 163.

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1831.

DOE *d.* EVANS and THOMAS *v.* OWEN and three Others.

**EJECTMENT** by tenants by *elegit*, tried before *Bosanquet*, J., at the last Assizes for the county of *Cardigan*.

At the trial, the lessors of the plaintiff proved a judgment in the Great Sessions, of *August*, 1830, in an action against *Owen*, the *elegit* taken out upon it, the inquisition, and the Sheriff's return; and also produced a lease of the whole property, dated in 1793, for three lives, of which *Owen* was one, and under which, previous to and at the time of the judgment, *Owen* was entitled to the whole property.

*E. V. Williams* objected, on the part of the three defendants, (not parties to the judgment), that, as against them, there was no case, because the *elegit* creditors could only be entitled to what the debtor had; and there was no evidence to shew that the debtor could turn the other defendants out of possession.

The learned Judge, however, directed a verdict for the plaintiff, with leave to move to enter a verdict for the three defendants who were not parties to the judgment against *Owen*.

*Williams* accordingly obtained a rule *nisi*, against which cause was now shewn by—

*Russell*, Serjt., and *Lloyd Hall*.—It is true, that a judgment and *elegit* cannot affect prior interests; but here there was no evidence of a prior tenancy. The consent rule indeed shews that the three defendants were in possession of some part in *February*, 1831; but if the defendants had any interest before *August*, 1830, the date of the judgment, they were bound to prove it, as being peculiarly within their knowledge. Besides, the plaintiff proved a *prima facie* case, by shewing that *Owen* held the whole under a

If, at the time of the judgment, the *elegit* debtor is entitled to the whole property sought to be recovered in ejectment by the *elegit* creditor, other parties, who, with the *elegit* debtor, are in possession when the ejectment is brought, must prove their title; and, if they do not, the *elegit* creditor is entitled to judgment against all.

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lease of the whole to him, which was put in as part of the plaintiff's case.

*E. V. Williams*, in support of the rule.—The verdict was wrong so far as relates to the three defendants, not the *elegit* debtors. The *elegit* and inquisition were a necessary part of the title of the lessor of the plaintiff, but they could not bind or affect or be evidence against those who were not parties. Their operation in this respect was the same as that of a lease and release or other conveyance, which would only have been evidence against the parties, and those claiming under them. Here, it was part of the plaintiff's case, that the three defendants were in possession; for, until the time when the form of the consent rule was changed by the introduction of the confession of possession, the plaintiff in ejectment was bound to prove the defendant's possession; and though now the consent rule supersedes the necessity of giving evidence on this point, it is no less a part of the plaintiff's case. That possession then must be taken to be a rightful possession; at all events, the plaintiff must prove it a wrongful one, for the defendants have a right to stand upon their possession. It is no answer to say, that the defendants may prove their title, for that would apply to every case of ejectment; but the plaintiff is bound in this action, in the first place, to prove his title strictly. Suppose that this action had been brought against the three only; would the case have been made out against them? Can it make any difference that the action is brought also against another?

Lord LYNTHURST, C. B.—In an ejectment, the plaintiff proves his *prima facie* title, and there rests his case; and the defendant must meet that proof by shewing, either that the plaintiff has not the legal title, or, admitting the plain-

tiff's title, that he has a title in himself which is consistent with it. The *onus* of proving this lies on the defendant, and he cannot, merely because he is admitted to be in possession at the time the ejectment is brought, assume that he has a title, provided the plaintiff's title is proved. Now, in this case, the lease is put in, upon which the *elegit* attaches, and that lease vests the property in *Owen*. The presumption is in favour of the continuance of the title under that lease, and if the defendants rely upon any thing inconsistent with that presumption, it is their duty to shew it. The title of *Owen* is co-extensive with the property comprehended in the lease; and the mere circumstance of the defendants being in possession, as admitted by the consent rule, appears to me to amount to no more than an admission of their being in possession at the time the ejectment was commenced. But the *onus* of proving their title previous to the judgment lies on the defendants.

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BAYLEY, B.—I quite agree, that, in order to recover in ejectment upon an *elegit*, a good title must be shewn against all the defendants, in the party by whom the ejectment is brought. It is clear, that the judgment binds the lands from *August*, 1830; and that *Owen* is entitled to the whole property claimed, under the lease of 1793. Now, *Owen* is the *elegit* debtor; and, therefore, the lessors of the plaintiff have made out a good title to the possession of the whole property, except against such persons as claim under him by title anterior to *August*, 1830. There are, however, three other persons, in addition to *Owen*, in possession of the property at the time the ejectment is brought; and therefore, in order to get possession of the whole, which, in *August*, 1830, the *elegit* creditors were entitled to, an ejectment is brought against all those persons. They are conusant of what their title is, and I have always considered it to be a rule of pleading, that the party in whose knowledge a particular fact is, is the party upon whom the

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proof of that fact lies. If the facts had been stated in pleading, and the *elegit* creditors had shewn title in *Owen* through the lease, would it not have been necessary for the other defendants, in order to rebut the *prima facie* title of the plaintiff, to have said—that is true, but *Owen* made us his tenants; and to have shewn the period at which the tenancy commenced? The lease shews that *Owen* has the whole title to the whole property, and the other defendants must come in under him, or adversely to him. Their title is within their own knowledge, and they must prove it; but it is not within the knowledge of the *elegit* creditors. If they come in under *Owen*, they can shew the commencement of their tenancy; but if they give no evidence upon that subject to shew that their title commenced before *August*, 1830, I am of opinion that the evidence is sufficient to entitle the lessors of the plaintiff to recover against them; because, after evidence that the title to the whole is in the *elegit* debtor, the *onus* of proof is shifted upon them.

GARROW, B., concurred.

BOLLAND, B.—The only question is, upon whom the *onus* of proof lies? and it appears to me that it lies upon the defendants. The consent rule merely admits that the parties are in possession at the time the ejectment is brought. The *elegit* creditors come in under the same title as their debtor, and if the debtor had brought an ejectment against these defendants, they must have shewn their title; and if they did not, they would have had no defence to the ejectment.

Rule discharged.

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ANTHONY v. REES and Another.

**REPLEVIN.** Avowry and cognizance for rent due to *Walter Rees*. Pleas—*Non tenuit* and *riens in arrear*.

At the trial, at the last Summer Assizes for the county of *Carmarthen*, before *Bosanquet, J.*, the question (a) was, whether *Walter Rees* took the legal estate in a dwelling-house called *Plasbach*, under the will of his grandfather, *Griffith Thomas*, dated 18th May, 1829, which contained as follows:—

“ I give and bequeath to my daughter *Mary*, the wife of *John Morgan*, of the *White Lion*, in the village of *Llandarog*, the sum of 6*l.* yearly, and every year, as long as the lease will last, to be raised out of the profits of the lease of *Penlan*. And further, I give and bequeath to the above-named my daughter *Mary*, the house called *Tumble*, after the decease of her mother, my well-beloved wife, to be freely possessed and enjoyed as long as she lives, and, after her decease, to my grandson *Griffith Evans*, his heirs and assigns, for ever, together with the two meadows belonging thereto; and further, to my grandson *Griffith Evans*, one bedstead, one hanging press, one table, one shelf and dresser in the kitchen of *Penlan*. I give and bequeath to my granddaughter *Mary*,

A testator, amongst several other bequests and devises to his grandchildren, gave to his granddaughter *M.* a house called *Plasbach* (a freehold), remainder, on her death without issue, to her brother, *W. R.* He afterwards gave to his wife “ the sum of 20*l.* yearly, and every year, to be paid out of the freehold estates, and the lease of *Penlan* (a leasehold), by trustees therein-after named, and, at the same time, notwithstanding there would be nothing to the grandchildren as long as their grandmother lived.” The testator afterwards nominated and appointed *E. F.*

and *G. H.* “ as trustees to look in that justice should be duly administered between the said parties.” *M.* died in the testator’s lifetime, and the wife survived the testator:—*Held*, that *W. R.* did not take the legal estate, but that it vested in the trustees.

(a) Another point was taken at the trial. It appeared that *Walter Rees* had only been entitled to the estate in question, on his own shewing, since the death of his grandfather, in *December*, 1829; and the avowry being in the usual form for half a year’s rent due to

him on the 25th *March*, 1830, it was contended, that this was a variance. The Court, however, on the motion for the rule *nisi*, expressed a strong opinion that the verdict for the plaintiff could not be supported on this ground.

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the daughter of *Robert Rees*, gentleman, the house called *Plasbach*, where widow *William Anthony* now lives; and if it happens she dies without issue, then I give and bequeath the said house to her brother *Walter Rees*, to be freely possessed and enjoyed, his heirs and assigns, for ever; Do. to the above-named *Walter Rees*, the house where *David Davies*, smith, now lives, to be freely possessed and enjoyed, his heirs and assigns, for ever; Do. to *Mary Jenkins*, my granddaughter, the house where *Margaret David*, widow, lives; also the house where *James Madoch*, smith, now lives, between my two granddaughters, *Mary* and *Margaret Jenkins*; Do. to *William Evans*, the house where *Walter*, the weaver, now lives, and the smith shop on the mountain; Do. to my granddaughter *Mary Jenkins*, one feather bed with the appurtenances, and one half chest after the decease of my beloved wife; and if she shall happen to die without issue, then I give and bequeath the same to her sister *Margaret*: and further, I give and bequeath to my well-beloved wife the sum of 20*l.*, yearly and every year, as long as she lives, *to be paid out of the freehold estate and the lease of Penlan, by trustees hereinafter named*, and, at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives, and all just debts is paid; and further, that if it shall happen that either of my two daughters happen to die in the lifetime of their husbands, then and there my two sons-in-law is to find sufficient security for the goods and chattels they have to their possession to the trustees, to be kept safe to the children of the deceased; and if he or they shall refuse to give security to the trustees for the same, and further I do ordain and empower my under-named trustees to take possession, that the whole of my goods may be kept safe for my grandchildren, and to be divided between them share and share alike; and my two daughters to be my two executrix of this my last will and testament: To have and to hold all and singular my goods and chattels except as be-

fore excepted; and further, if any of my relations shall at any time cause any trouble to the trustees, I do utterly cut them off from any benefit of this my last will and testament. And further, at the same time, I do hereby nominate and appoint my trusty friends *Morgan Rees*, gent., of *Rhydyccerrig*, and *Philip Walton*, of *Cappel*, as trustees to look in that justice should be duly administered between the said parties."

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*Mary Rees*, the sister of *Walter*, died without issue in the life-time of the testator. The testator died in *December*, 1829. The widow of the testator was living at the time of the trial.

The learned Judge being of opinion that the trustees took the legal estate under the will of *Griffith Thomas*, directed a verdict for the plaintiff, and gave the defendant leave to move to enter a nonsuit.

Accordingly, *Maule* obtained a rule to enter a nonsuit, against which cause was now shewn by—

*Russell*, Serjt., *John Evans*, and *Malkin*.—The question is, whether the legal estate is given to the trustees. If it be not, the duties of the trustees cannot be performed. It is a clearly established principle, that, where trustees are appointed by a will, and trusts are created to be performed by them, the law will imply such an estate as will enable them to perform the trusts. Lord *Ellenborough*, in *Trent v. Hanning* (a), says—"To be sure, trustees must, in all cases, be presumed to take an estate commensurate with the charges or duties imposed upon them." It will be said, that though implication may cut down an estate, yet, that when none is given, it would be too much to create an estate by implication; but the cases are decisive, that an estate may be implied where it is necessary for the duties which the trustees have to perform. *Trent v. Hanning* is directly in point. That was a devise to the testator's wi-

(a) 7 East, 97.

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dow, of "200*l. per annum* for life, in addition to her jointure;" which jointure was secured out of real estates, "his debts being previously paid; and to his younger children 600*l.* each, to be paid respectively at twenty-one." The testator afterwards appointed "*A., B., and C., as trustees of inheritance* for the execution thereof." The case was first sent from the Court of *Chancery* to the *Common Pleas* (a), and the Lord Chancellor, not being satisfied (b) with the certificate of the *Common Pleas*, sent the case for the opinion of the Court of *King's Bench* (c). The majority of the Judges of that Court, (*Lawrence, J., dissentiente*), were of opinion that the trustees took a fee in the testator's lands. Mr. Justice *Lawrence's* certificate shews that he doubted, on the grounds that the testator's lands were not at all referred to, and that the expression of "inheritance," used in the will, was too uncertain to pass the estate. The Lord Chancellor having decided in conformity with the opinion of the Court of *King's Bench*, the case was taken to the House of Lords, on appeal, where it was ultimately decided (d) according to the opinion of the majority of the Judges of the Court of *King's Bench*. That case went much further than is requisite for implying an estate in the present case. In *Trent v. Hanning*, the freehold estate was not mentioned, much less was there an express charge upon it, as here; but the implication arose from the jointure of the wife, which was secured on freehold estate, and from the words "trustees of inheritance." In *Oates v. Cooke* (e), the testator, after bequeathing several legacies, added, "these legacies to be faithfully paid by my trustee, *John Cooke*, every year, &c. &c." He afterwards left "unto my trustee and executor, out of the yearly rents of the farm, 1*l.* 10*s.* a-year," for repairs, &c.;

(a) *Trent v. Hanning*, 1 N. R.  
117.

(b) 10 Ves. 500.

(c) 7 East, 97.

(d) 1 Dow, 102.

(e) Burr. 1684.

and he afterwards constituted *John Cooke* "sole executor and trustee of this my last will and testament, he paying all my just debts, legacies, and funeral charges." It was considered by the Court as quite clear that the trustee took a fee, Lord *Mansfield* observing, that he had not a particle of doubt, and Mr. Justice *Wilmot* saying, that there were trusts to be executed which the trustee could not execute and effectuate without having an estate in fee devised to him. In the present case, the trusts clearly could not be executed unless the trustees took the legal estate; for, how could they pay the 10% a-year out of the freehold, without having the legal estate? *Doe v. Woodhouse* (a) very closely resembles the present case, and is a strong authority in the plaintiff's favour. They also cited *Doe d. Leicester v. Biggs* (b), and *Jenkins v. Jenkins* (c).

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*Maule and E. V. Williams, contra.*—The words of the devise to the granddaughter *Mary*, and, after her death, to *Walter Rees*, amount to an express devise of a legal estate; and the question is, whether implication can be admitted to defeat such express devise. The cases which have been cited by the other side do not bear out the argument contended for in its generality. *Oates v. Coake*, which has been cited from *Burrow*, is also reported in Sir *W. Blackstone's* (d) Reports; and from that report it appears that one of the annuities was given to the heir, which clearly shewed that he was not to take, and then there was nobody else to take except the trustee; that circumstance clearly excluded the devolution to the heir. In *Trent v. Hanning*, Mr. Justice *Lawrence* differed from the rest of the Court of *King's Bench*; so that (the *Common Pleas* being unanimous) five judges were of a contrary opinion to that expressed by three in the *King's Bench*.

(a) 4 T. R. 89.

(b) 2 Taunt. 109.

(c) 1 Willes, 650.

(d) Sir W. Bl. 543.

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In the House of Lords, too, the case was treated as a very doubtful one by the Lord Chancellor. The words there were much stronger than in the present case. The Court had only to supply the word "my," to make the expression "of inheritance" clearly referable to the landed property. In this case, the parties are appointed as trustees to see justice done; that is, to form a kind of domestic *forum*. That differs very much from the words "of inheritance," used in *Trent v. Hanning*. In that case the trustees could not possibly have performed the duties without taking a fee; and there would have been a total failure of the bequests to the children, if that construction had not prevailed. The words "of inheritance" in that case, were the chief ground of the decision, and there are no such words here. To the last, *Trent v. Hanning* was treated as a case of very great doubt. *Doe v. Woodhouse* is a very different case from the present. There were directions in the beginning of the will, that the trustees should pay debts, &c. There was a legacy to the heir-at-law, and no express estate was given after the death of the wife. An express estate cannot be destroyed by implication. In *Bamfield v. Popham* (a), it was resolved, that words of implication in a will should never destroy what was before expressed.

[Lord *Lyndhurst*, C. B.—Suppose an estate in fee were given in terms to the trustees, would not that be consistent with the other facts. The will would then give the legal estate to the trustees, and the equitable estate to those beneficially interested. The only way to reconcile all parts of the will is, to give the trustees the legal, the other parties the equitable estate].

There is an *express legal* estate given in the prior part of the will.

[*Bayley*, B.—It is too strong to say an *express legal*

(a) 1 Pere Wms. 54.

estate; if the testator had said, I give such an estate to my granddaughter, and had said, I mean the legal estate, that would be an *express legal* estate; but, if you use words which denote either a legal or an equitable estate, it is difficult to say that you give an *express legal* estate].

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*Prima facie*, at least in the first part of the will, there is an express legal estate; and there is not any necessity for an implication of any estate in the trustees. The will may be carried into effect without such implication. They are simply mentioned as trustees to look in and see justice done between the parties. The person who framed this will had probably in view the supervisors, who formerly were mentioned in testamentary dispositions (a). It was formerly usual to appoint, not merely trustees and executors, but supervisors, who were to overlook them, and see that the will was properly executed. Besides, the payment of debts and provision in favour of the widow would be good by way of charge, without implying any estate in the trustees. The proper construction is, that the trustees take an annuity or rent-charge as trustees for the widow, and they are to raise and pay it over to the widow. This construction would carry the whole of the intention of the testator into effect. If a legal estate in the trustees must be presumed, why not a legal rent-charge with powers of distress and entry, which would be a natural and proper mode of supporting the widow.

[*Bayley, B.*—You would prefer the circuitous and hazardous mode of a distress, to the trustees' having the lands, so as to be able to receive the rents, and pay them over according to the provisions of the will].

In *Wilkinson v. Adams* (b), Lord *Eldon* says: "With regard to that expression, necessary implication, I will repeat what I have before stated from a note of Lord

(a) Jacob's L. D. "Supervisor."

(b) 1 Vez. & B. 466.

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*Hardwicke's* judgment in *Corriton v. Hellier* (a), that, in construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed."

LORD LYNTHURST, C. B.—This testator gives and bequeaths to his granddaughter *Mary*, the house called *Plasbach*, where widow *Anthony* now lives; and, after her death without issue, he gives and bequeaths the said house to her brother *Walter Rees*, to be freely possessed and enjoyed, his heirs and assigns, for ever. Now, if the will stopped here, there could be no doubt but that it would pass the legal estate to the granddaughter, with remainder to *Walter Rees*. But the will must be taken altogether; and we find, in a subsequent clause, that the testator gives and bequeaths to his well-beloved wife the sum of 20*l.*, yearly and every year, as long as she lives, to be paid out of the freehold estate and the lease of *Penlan*, by trustees thereafter named, and, at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives. Therefore, the estate originally given is qualified and restrained, and must be construed as subject to this clause. Now, the trustees cannot perform the duties imposed upon them, unless the legal estate is vested in them. If the rents and profits should amount to more than sufficient to pay the annuity of 20*l.*, they would be bound to pay over the surplus to the grandchildren. The trustees, therefore, will take the legal estate, and the grandchildren will have the beneficial interest after the 20*l.* annuity is satisfied, and thus both the provisions in the will are reconciled.

(a) 2 Cox, 340, cited in 4 Bro. C.C. 460, 461, 2 Burr. 923, 3 Burr. 1631.

BAYLEY, B.—I am of the same opinion; and I think, that, by the construction we adopt, we give effect to every part of the will, and that we should not do so if we decided in favour of any other construction. It is clear, that we are bound to look at all the parts of the will, to see whether a provision which may at first appear absolute, be not qualified by some subsequent clause. If the will stopped after the devise to the grandchildren, the devise to them would stand unqualified. I cannot say that it would be an *express* devise of a *legal* estate, because there is no expression to shew that a *legal* estate is meant; and, therefore, Mr. *Maule's* argument is fallacious in this respect.

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Is there then any subsequent qualification? Suppose it had been "subject to the qualifications hereinafter mentioned." But these words are necessarily implied.

Now, what is the qualification? "I give and bequeath to my wife (not to trustees, according to the argument, that they might take a rent-charge,) the sum of 20%. yearly, &c., to be paid out of the freehold estate and the lease of *Penlan*, by trustees hereinafter named, and, at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives."

It is not necessary to stop to consider whether there is any trust for the payment of debts, but we are to see what the trustees are directed to do; for, when trustees are directed to do any thing for the performance of which the legal estate is requisite, then they are to have the legal estate. Now, here, they are to pay out of the *freehold estate*; how can they do so except by taking the rents and profits, and paying the annuity out of them. So much as is requisite to satisfy the annuity is to be paid by them, and perhaps they would be bound to pay what remains, if any, to the grandchildren. It is said, that it is not necessary to imply a legal estate in the lands, but that holding the trustees to have a rent-charge would effect-

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ate the objects of the testator. In my opinion, however, the power which this testator meant the trustees to have, was not one for the execution of which they would be forced into a Court of Equity, or be driven to distrain. If trustees are to pay out of the lands, there are many cases which shew that they must take the legal estate. Upon the whole, I entertain no doubt that the legal estate was vested in the trustees, it being necessary for the performance of their duties. *Doe v. Woodhouse* goes almost the whole length of the present case.

GARROW, B., concurred.

BOLLAND, B.—It has been contended, that the trustees mentioned in this will were only intended to be supervisors, or friendly arbitrators, to constitute a species of domestic *forum*. But if we look at the earlier parts of the will, we shall find that the trustees are mentioned again and again, and in a way which shews that they have duties to perform as trustees. Thus, the trustees are, in certain events, to take security for the personalty, to take possession of it, and to keep it for the grandchildren. It is not until the end of the will that the words, “to look in that justice should be duly administered,” are introduced. I cannot distinguish this case, in principle, from *Doe v. Woodhouse*. It being necessary for the performance of their duties that the trustees should take the legal estate, I am of opinion that it did not vest in *Walter Rees*, and, consequently, that this rule must be discharged.

Rule discharged.

*Exch. of Pleas,*  
1831.GIBSON *v.* WHITE.

**COMYN**, on behalf of the bail, having obtained a rule *nisi* for time to render the defendant, who was in the custody of the keeper of *Newgate*, under a warrant from commissioners of bankrupt, and was to be brought before the commissioners in a few days—

*Butt* shewed for cause, that the bail had not justified; and contended, that they could make no motion until by justification they were in Court.

But the Court said, that, as the defendant was as it were in criminal custody, and the bail could not make the render in due time, this was an exception to the general rule, and therefore the bail ought to have time to render.

Rule absolute.

POOLE *v.* SALTER.

**IN** this case the defendant had pleaded judgment recovered; and there not being time in the remainder of this term for the plaintiff to move for a rule to produce the record—

*Alexander* moved, on affidavits that the plea was totally false, to be at liberty to treat the plea as a nullity, and sign judgment; and he urged, that the plaintiff would be delayed until next term, if this course were not allowed.

It appeared that the plea had been delivered in time for the plaintiff to have proceeded and got his judgment in the usual way. And—

Where a defendant is in custody under a warrant of commissioners of bankrupt, the Court will enlarge the time for rendering the defendant, though the bail have not justified.

The Court refused to set aside a plea of judgment recovered, on affidavit of its being totally false, though there did not remain time for the plaintiff to get judgment in the term, he having neglected to take the regular steps for that purpose in the earlier part of the term.

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*Per Curiam.*—You should have taken the regular steps to have obtained judgment in the earlier part of the term.

. Rule refused.

### HODGKINSON v. WHALLEY.

A plaintiff cannot have concurrent writs of *fi. fa.* and *ca. sa.*, and act under both; and therefore, where a defendant was taken under a *ca. sa.*, before the return of a *fi. fa.* under which the plaintiff had seized, though the whole amount of the levy was swallowed up by the landlord's claim for rent, except 17s. 6d., which went towards the expenses of the execution—The Court discharged the defendant out of custody.

*R. v. RICHARDS* had obtained a rule to discharge the defendant out of custody, on the ground (a), that the *capias ad satisfaciendum* under which he had been taken, had been issued before the return of a concurrent writ of *fi. fa.*, under which a levy had been made. The whole amount of the levy was paid over to the landlord for rent, under 8 Anne, c. 14, s. 1, except the sum of 17s. 6d., which went towards the expenses of the execution.

*Follett* shewed cause.—The plaintiff had a right to issue both writs, but only to execute one (b). The question, then, is, whether there was any execution of the *fi. fa.*? Now here, the rent swallowed up all except the sum of 17s. 6d., which must go towards the expenses. There was, therefore, no occasion to return the writ of *fi. fa.*, as nothing was done under it towards satisfying the plaintiff.

BAYLEY, B.—The record would be irregular if this rule were not made absolute, for there would appear an award of both a *fi. fa.* and a *capias ad satisfaciendum* at the

(a) Another ground was, that the *cognovit* on which the judgment had been entered, had been obtained from the defendant whilst in custody, without the presence of an attorney; but *Rich-*

*ards* abandoned this point, conceding that there was no rule of this Court on the subject applicable to *cognovits*.

(b) *Miller v. Parnell*, 6 Taunt. 371.

same time. No doubt, both may issue together, because the practice is not to enter them on the record if nothing is done. But, if you execute one, you must make an entry of the return of that, before you can award the other. Here, there has been a seizure under the *fieri facias*; and if an action of trespass were brought for the seizure, you would have to justify under the *fieri facias*. It is clear, on principle, that you cannot have two writs, and act under both at the same time (a).

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The rest of the Court concurring, the rule was made—

Absolute, with costs, if defendant would undertake to bring no action; without costs, if he would not.

(a) See *Edmond v. Ross*, 9 Price, 5.



# WILSON v. MINCHIN.

**PLATT** shewed for cause, against a rule obtained by *Follett*, calling on the plaintiff to find security for costs, that an order for time to plead had been granted; and he cited *Duncan v. Stent* (a).

Security for costs may be applied for, after an order for time to plead.

[*Bayley, B.*—That was after plea pleaded].

The party, here, is in the same situation, by taking an order for time to plead, as if he had actually pleaded.

**BAYLEY, B.**—A defendant may come to ask for security for costs at any time before plea pleaded. The principle is, that the application should be made in the earliest stage of the proceedings, in order to avoid unnecessary expense.

(a) 5 B. & A. 702; 1 D. & R. 348.

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1831.

WILSON  
v.  
MINCHIN.

The rest of the Court concurring. The rule was made absolute.

Rule absolute (a).

(a) See Chitty's Practice, 102.

### ANONYMOUS.

The Court will not order security for costs, on the ground of one of the plaintiffs being resident abroad, where another of the plaintiffs is resident in this country.

**THIS** was an action by two plaintiffs.

*Follett* had obtained a rule for security for costs, on the ground of one of the plaintiffs residing abroad; against which—

*Platt* now shewed for cause, that the other plaintiff resided in this country.

BAYLEY, B.—I know of no case in which security for costs has been required, where one plaintiff was in this country and the other abroad.

The rest of the Court concurred, and the rule was discharged.

Rule discharged (a).

(a) See Tidd, 535.

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PERRY v. WILLIAM TURNER, JAMES TURNER, and ISAAC JOEL.

**J**UDGMENT had been entered up, and execution issued on a *cognovit*, dated 3rd November, by which an instalment of 5*l.* was to be paid on the 5th, and the remainder of the plaintiff's demand at other specified periods, and the plaintiff was to be at liberty to enter up judgment and issue execution for the whole on any default. The two *Turners* had signed the *cognovit* on the 3rd November, but the other defendant, *Isaac Joel*, did not sign it until the 7th, the first instalment being then due, and a default having been made by its non-payment. On the morning of the 7th November, one of the defendants went to the office of the plaintiff's attorney, and paid a clerk there 5*l.*, and asked for a receipt, and that the payment of the first instalment should be indorsed on the *cognovit*; when he was informed by the clerk that the attorney had locked up the *cognovit*. At ten o'clock on that day judgment was signed. The plaintiff's attorney informed the plaintiff of this payment, and received instructions to give no further indulgence. He thereupon gave the defendants notice that he should insist on the default; and, on the 8th, gave a notice of the taxation of costs for the next day, the 9th, which, upon the application of one of the defendants, was postponed until the 10th. On the evening of the 9th, the plaintiff's attorney sent by post a notice to one of the defendants, to attend the taxation of costs at two o'clock the following day, which was received at ten o'clock of the morning of the 10th. The defendants' attorney attended at the office at two o'clock; but, finding that the Master, who does not attend until three, was not

A *cognovit*, dated 3rd November, by which 5*l.* was to be paid on the 5th, and the residue of the plaintiff's demand at stated periods, the plaintiff being at liberty to sign judgment and issue execution for the whole upon any default, was signed by two defendants, *W. T.* and *J. T.*, on the 3rd, and by the other defendant, *I. J.*, on the 7th. On the 7th, the first instalment was paid to the plaintiff's attorney's clerk, who had no authority to receive it; and subsequently, on that day, judgment was signed; on the 8th, notice was given to tax costs on the 9th, which, at the request of one of the defendants, was postponed till the 10th. On the morning of the 10th, the defendants' attorney received a notice to attend the taxation of costs at two o'clock that

day; he did not attend, and the costs were taxed in his absence:—*Held*, that the judgment was regular—that the execution of *I. J.*, on the 7th, related back to the 3rd—that the acceptance of the instalment by the clerk without authority did not waive the default—and that it was unnecessary, under the circumstances, to give a full day's notice to tax costs on the 10th.

*Quere*, whether the omission to give one day's notice to tax costs renders a judgment for debt and costs irregular.

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there, and that the plaintiff's attorney was not come, he went to the office of the plaintiff's attorney, and told a clerk that it was not convenient for him to attend that day; but the clerk told him that the plaintiff's attorney was gone to the office with the papers, which was the fact; and the costs were taxed in the absence of the defendants' attorney.

A rule *nisi* having been obtained by *Lloyd Hall* to set aside the judgment and execution for irregularity, upon the following grounds:—*first*, that the *cognovit* had not been signed by *Joel* before the first default; *secondly*, that the notices of taxation were insufficient; and *lastly*, that judgment could only be entered up for the one instalment due—

*Aglionby* shewed cause.—The first instalment became due before the *cognovit* was executed by *Joel*; but, by the execution, he placed himself in the same situation as if he had executed the *cognovit* at the time it bears date. It is a joint judgment upon a joint *cognovit*; and the execution of *Joel* relates back to the period when it was executed by the other defendants. The first notice of taxing costs was regular, and in strict pursuance of the rule of Court (a): that was postponed at the request of the defendant, and a fair and reasonable notice was given for the 10th. It is not necessary, under such circumstances, that a full day's notice should be given. By the terms of the defeazance, upon one default the plaintiff is entitled to sign judgment for the whole debt.

*Lloyd Hall*, in support of the rule.—The judgment cannot stand against the defendant *Joel*, who signed the *cognovit* after the default was made, upon which the judgment proceeds. At the time of the default he was no party to the *cognovit*, and could not be bound by it; as in

(a) *Ante*, Vol. 1, p. 472, pl. 12.

the case of a deed, which only binds from the date of the actual execution. The notices of taxation are irregular, not being served upon the attorney for the defendants; and the last is also irregular, because it was not served one whole day previous to the time of taxing the costs. There was in fact, therefore, no regular *allocatur*; and, without an *allocatur*, a judgment, which includes costs, is not final. *Butler v. Bulkeley* (a). Without a final judgment, the execution cannot be supported. *Lastly*, execution could only issue for the instalment due. The *cognovit* is merely a security for the regular payment of the instalments, in the nature of a penalty, which cannot be treated as liquidated damages. *Astley v. Weldon* (b), *Charrington v. Laing* (c), *Kemble v. Farren* (d).

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[*Bayley, B.*—In *Charrington v. Laing*, the defeazance was conditioned for the performance of several acts within a certain time, some of which were performed. The Court admitted the judgment to be regular, and referred it to the Prothonotary to inquire what was actually due to the plaintiff.]

The money was paid before the judgment was actually signed. There was, therefore, no cause for signing the judgment; and the execution should at all events be staid, the judgment standing as a security for the payment of the future instalments.

BAYLEY, B. (e)—If any injustice has been done by the Master's taxing the costs in the absence of the defendant's attorney, it may be sent back to him to see whether there should be any deductions. But, independently of that consideration, the judgment and execution seem to me to be regular. The objection to the judgment is, that when the *cognovit* was executed by *Joel*, one of the defendants,

(a) 8 Moore, 104; 1 Bing. 243.

(b) 2 B. & P. 346.

(c) 6 Bingh. 242.

(d) 6 Bingh. 141.

(e) Lord Lyndhurst, C. B., was sitting in Equity.

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the time for payment of the first instalment had gone by; and therefore, that though the *cognovit* in form was to give indulgence, in effect it was forfeited. I am, however, of opinion, that when the party executed, he executed subject to all the same consequences as if he had executed it at the time when it bore date. The date shews to what period of time the *cognovit* may be considered as referring, that is, the 3rd; it was then executed by two of the defendants, and the third does not execute it until the 7th; but when he does execute, he agrees to the language of the *cognovit*, and puts himself in the same situation as if he had executed on the 3rd. He might think, and hope, and expect that judgment would not be immediately signed; but there was nothing to prevent the plaintiff from doing so. I think, therefore, that his execution related back to the time of the date; and that the plaintiff was at liberty, if he thought fit, to insist on his right immediately to sign judgment on the *cognovit*.

On the morning of the 7th, however, it appears that the instalment was paid; and if that had been accepted by a person having full authority, as a waiver of the default, such waiver would be binding; but here, the payment was merely to the attorney's clerk; and the attorney had prudently locked up the *cognovit*, so that no one could indorse any payment upon it. The attorney, instead of accepting the money as a waiver, is instructed by the plaintiff to give no indulgence, but to proceed immediately; and he then gives a notice to the parties that he intends to insist on the default, as if no payment had been made.

Then, are the proceedings irregular on the other ground, that no regular notice of the taxation of costs has been given? On the 8th, a regular notice is given for the 9th; and if the taxation had taken place on that day, there could have been no objection; but, in the meantime, one of the parties makes an application to the plaintiff's attorney to have the taxation postponed. As the taxation binds all, each has a right to

ask for such indulgence. I am not clear that the plaintiff might not have taxed on the 10th, after what had taken place, without giving any further notice; but, at all events, he was not bound to give the one day's notice; and if he gave a fair and reasonable notice, his proceedings were not irregular. Now, it appears, that, on the evening of the 9th, a notice was put into the post, which found its way to the defendant's attorney on the following morning. That notice was for two o'clock on the 10th; it is known, however, that the Master does not attend until three, and, therefore, that is a notice of two for three. The defendant's attorney goes at two, and not finding the plaintiff's attorney in attendance, he goes to the office of the plaintiff's attorney, and tells his clerk that it is not convenient for him to attend any longer on that day; but it is not sworn that it was inconvenient for him to attend. The clerk, however, did not acquiesce in any delay, but informed him that the attorney for the plaintiff was gone to the Master's office with the papers. If the defendant's attorney had gone then, he might have been present at the taxation which then took place.

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I have cautiously avoided expressing any opinion as to whether a neglect to give notice of taxation of costs gives the defendant's attorney a right to set aside the proceedings for irregularity. The Court has made an order regulating what notice shall be given; but it has not said what the consequences of not following that order shall be. It may be, that the Court would consider it as a matter on which they are to use their discretion in each particular case, and that in some cases they would set aside the judgment, in others they would not (a).

Upon the whole, I am clearly of opinion that we cannot treat this as an irregular judgment.

(a) See *Shaw v. Evans*, 10 East, 576, and *Millar v. Bowden*, ante, Vol. 1, p. 563, in which it was holden that a non-compliance with rules of Court, which are merely directory, does not avoid the proceedings.

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GARROW and BOLLAND, Barons, concurred; and the rule—

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Was discharged without costs; the Master to say whether any, and what, deduction should be made from the amount of the costs as taxed.

FISHER v. GOODWIN.

There must be three attempts to serve the *venire* before a *distringas* can be obtained.

**STEER** moved for a *distringas*. The affidavit only stated two attempts to serve the defendant.

**BAYLEY, B.**—There must, in general, be at least three attempts to serve the defendant with the *venire*, at his residence. The affidavit must state where the residence is, and disclose the answers given to the inquiries after the defendant, in order that the Court may see that the defendant is in the neighbourhood, and keeps out of the way to avoid the service.

Rule refused.

WOOD v. BENSON.

Guarantie—"I engage to pay (plaintiff) for all the gas which may be consumed in the Minor Theatre, &c. during the time it is occupied by A. B.; and I

**ASSUMPSIT** by the clerk of the *Manchester Gas Works*, on the following guarantee, signed by the defendant:—

"I, the undersigned, do hereby engage to pay the directors of the *Manchester Gas Works*, or their collector,

also engage to pay for all arrears which may be now due."—*Held*, that the agreement was void as to the arrears, but that the amount of the gas subsequently supplied might be recovered under a count for goods sold.

for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. *Neville*; and I do also engage to pay for all arrears which may be now due. Witness my hand, this 10th day of *August*, 1830."

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There was a count for gas and goods sold and delivered. Plea, the general issue.

At the trial, before *Parke, J.*, at the last Summer Assizes for the county of *Lancaster*, it appeared that 13*l.* 15*s.* 6*d.* was due for arrears, and 15*l.* 4*s.* 6*d.* for gas supplied after the guarantie was given. It was objected, that there was no consideration apparent on the face of the instrument for the promise to pay the arrears; and that the agreement, therefore, being void as to part under the statute of frauds, was void as to the whole.

The learned Judge directed the Jury to find a verdict for the plaintiff for 29*l.*, and gave the defendant leave to move to enter a nonsuit.

*Joshua Evans* accordingly obtained a rule to enter a nonsuit, citing *Lee v. Barber* (a), *Lexington v. Clarke* (b), *Chatter v. Beckett* (c), and *Thomas v. Williams* (d).

*Wightman* shewed cause.—The objection made in this case was, that the consideration for the by-gone debt was not sufficiently apparent on the face of the agreement; and then, that, if the agreement was void in part, it was void *in toto*; and that even the demand subsequently accruing could not be recovered. The consideration, however, for the whole of the promise is the future supply of gas; and the order in which the parts of the agreement occur is of no consequence, if it can be collected that the subsequent supply of gas was intended to be

(a) 2 Anstruther, 425, note.

(b) 2 Vent. 223.

(c) 7 T. R. 201.

(d) 10 B. & C. 664.

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the consideration for both branches of the promise. *Russell v. Moseley* (a) is expressly in point. The guarantie, there, was—"I hereby guarantee the present amount of Miss *H. M.*, due to *S. & Co.*, of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th *September* next." The terms of the instrument in that case are almost precisely similar to the present; and the plaintiff must succeed, unless the Court should be of opinion that *Russell v. Moseley* was wrongly decided. But, at all events, the plaintiff is entitled to recover for the goods supplied since the making of the agreement: he may recover them on the count for goods sold. Suppose that the agreement had stopped after the first part of the promise; it would clearly have been an original, and not a collateral order. It was not necessary to declare specially for the goods supplied since, for there was an original order of the gas by the defendant, and a promise to pay for it. If necessary, the present might be distinguished from the cases of *Lexington v. Clarke*, *Chater v. Beckett*, and *Thomas v. Williams*, on the ground that there was a variance in all those cases, as the whole of the special promise was not proved as laid, one part of it being void. The present, however, is the case of an original order, and not of a collateral promise to pay for goods. It can hardly be said, that an order is not binding because it contains, besides, a promise to pay a by-gone debt of another person. On the ground, then, that the consideration applies to both parts of the promise, the plaintiff is entitled to retain the verdict for the whole sum; if that ground fail him, he is entitled to retain the verdict for the amount of the goods furnished under this order, on the count for goods sold and delivered.

*Blackburn, contra.*—The supply was not to the defendant, but for the theatre, and for a third person, and there-

(a) 3 B. & B. 211; 6 Moore, 251.

fore the agreement was a collateral one, the consideration for which must be apparent on the face of the instrument itself. Here, it was not even stated that the gas was to be supplied by the defendant, but merely that it was to be consumed at the theatre. If *Neville* had refused to receive the gas, could the plaintiffs have recovered the arrears? There is nothing to shew that the Gas Company were bound to supply any thing; there is, therefore, no mutuality in the promise. In *Lees v. Whitcomb* (a), it was held, that a promise to remain with the plaintiff two years, for the purpose of learning a trade, was not binding, for want of a corresponding promise to teach.

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[*Bayley, B.*—The Court there thought, that what ought to have been a *continuing* consideration for the whole time, failed. In the present case, when the gas is supplied, the consideration is *executed*. In *Lees v. Whitcomb* it had not been, and never might have been, executed.]

*Lees v. Whitcomb* was decided on the ground, that no sufficient consideration was expressed on the face of the instrument in that case; and, yet, there was as much as in the present; for, here, there is nothing to bind the Gas Company to supply the gas. But, as there is no consideration for the promise to pay the arrears, the agreement, being entire, must fail altogether. In *Lea v. Barber*, cited in the note to *Cooke v. Tombs* (b), it was admitted, that the agreement was void as to the land; but the plaintiff's counsel sought to maintain it as to the personal property. It was ruled, however, on the authority of *Cooke v. Tombs* (c), that the agreement, being in its nature entire, could not be severed, and, being void as to the land, was void *in toto*.

[*Bayley, B.*—That was from the nature of the contract in that case. Unless the purchaser could have the whole, he clearly was not bound to take the part; but the case did

(a) 5 Bing. 34; 2 M. & P. 86. (b) 2 Anstruther, 425, n. (c) Ibid. 420.

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not proceed on the naked principle, that, because the contract was bad in part, it was bad *in toto*.

Lord *Lyndhurst*, C. B.—In *Lea v. Barber*, only part of the special promise laid was proved.

That is substantially an objection on the ground of variance; which observation applies to all the cases that have been cited on this head.

In *Thomas v. Williams*, the plaintiff declared on a promise to pay not only what was due, but the rent to become due at the following *Michaelmas*. The latter part being void, the whole promise was not proved as stated in the declaration.

*Bayley*, B.—And in the present case the same objection would have applied, on the first count of the declaration, and would have been fatal, if there had not been a good count on which the subsequent supply could be recovered; but the objection would have been on the ground that the plaintiff was bound to prove all the promise which he had stated, and not on the principle, that if a promise be void in part, it must necessarily be void *in toto*. There are a great many cases which shew the contrary of that proposition. Where a bond is conditioned to do two things, it constantly happens that a party is bound to do one, though, as to the other, the bond is void. Can you make any distinction between a bond and a promise?]

Lord *Tenterden*, after consideration, did not, in giving the judgment of the Court in *Thomas v. Williams*, put the case as a question of variance, but expressly decided it on the authority of *Lexington v. Clarke*, and *Chater v. Beckett*.

Lord *LYNDHURST*, C. B.—The case of *Thomas v. Williams* may, as it appears to me, be supported. Part of the contract in that case was void by the statute of frauds. The declaration stated the entire contract, in-

cluding that part of it which was void; and, therefore, the contract, as stated in the declaration, was not proved.

The same observation applies to *Lexington v. Clarke*, and *Chater v. Beckett*; and I have no disposition to complain of those decisions, because, in none of those cases does there appear to have been any count, upon which the plaintiff could recover.

But the question in the present case is widely different. The contract resolves itself into two parts. One is, "I engage to pay for all the gas which may be consumed," &c.; that is a distinct engagement. The other part is, "and I do also engage to pay all arrears," &c. Now this latter part cannot be sustained; for if it be a distinct engagement, there is no consideration to support it expressed on the instrument.

The question then is, if I undertake to pay for goods which may be supplied, though there is no promise to supply the goods, whether, when the goods are supplied, a right of action does not accrue to recover the amount. It is quite clear that it does. And though the latter part of the engagement cannot be sustained, under the first part of the engagement the plaintiff is entitled to recover for the gas subsequently supplied; and therefore the verdict must stand for 15*l.* 4*s.* 6*d.*

BAYLEY, B.—I am entirely of the same opinion.

I consider this contract as consisting of two branches; and it appears to me, that, as to the latter, there is no sufficient consideration to sustain the promise. But I am of opinion, that there is no objection to that part of the agreement which relates to the gas to be supplied subsequently to the guarantie.

I take it to be perfectly clear, that an agreement may be void as to one part, and not of necessity void as to the other. There are many cases in the books, where a contract has been held good in part and bad in part. A

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bond may be good, though the condition is good in part and illegal in part.

In many cases a distinction has been taken, as to what is illegal at common law, and what is made illegal by particular statutes; and it has been said, that the latter would vitiate the whole instrument, the former not.

I am, therefore, of opinion, that it by no means follows, that, because you cannot sustain a contract in the whole, you cannot sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good.

In each of the cases referred to for the purpose of shewing that the contract, if void in part, was void *in toto*, there was a failure of proof. The declaration in each of those cases stated the entire promise, as well that part which was void, as that which was good. I think, therefore, that these cases are to be supported on the principle of the failure of proof of the contract stated in the declaration; but that they do not establish that, if you can separate the good part from the bad, you may not enforce such part of the contract as is good. I am, therefore, of opinion, that the verdict must stand for the amount of the gas subsequently supplied.

GARROW, B., concurred.

BOLLAND, B.—This contract consists of two parts.

The consideration for the first part is, the supplying the theatre with gas.

Now, though the latter part of the agreement cannot be sustained, there is nothing to prevent the plaintiff from recovering on that part, the consideration for which has been executed by the supply of gas.

Rule discharged as to entering a nonsuit,  
the verdict to be reduced to 15*l.* 4*s.* 6*d.*

BAYLEY, B., observed, that one of the cases to which he had referred was, where the engagement was to pay money, and also to make a simoniacal presentation; which was decided to be good as to the money, but bad as to the simoniacal presentation (a).

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(a) See *Cheeseman v. Nainby*, *Pearson v. Humes*, Carter, 229; Lord Raymond, 1459; *Strange*, *Mordell v. Middleton*, 1 Vent. 237; 739; *Folkes v. Dominique*, *Strange*, *Newman v. Newman*, 4 M. & S. 66. 1137; *Norton v. Sims*, Hob. 12;

### THE ATTORNEY-GENERAL v. RANDLE JACKSON and WILLIAM JACKSON.

THIS was an information filed by his Majesty's Attorney-General against the defendants, to recover the sum of 97*l.* 13*s.* for certain legacy duty, charged in the said information to be due to the Crown from the defendants.

To the first count of this information, the defendants put in a demurrer, which, on argument, was allowed by the Court; and to the remaining counts of the information, the defendants pleaded that they did not owe the said sum in manner and form as in the information alleged, and thereupon issue was joined.

Upon the trial of the issues joined in this information, before Lord *Lyndhurst*, at *Westminster*, at the Sittings after last *Trinity* Term, a verdict was taken for the Crown by consent, for the said sum of 97*l.* 13*s.*, subject to the opinion of the Court upon the following case:—

subject to that annuity, he gave his real estates in moieties to *R. J.* in fee, and to *W. J.* for life:—*Held*, that legacy duty was payable upon this devise to *J. T.*, by *R. J.* and *W. J.*, the parties interested in the land subject to the annuity, though interested in moieties, the one in fee and the other for life only.

*Revenue.*

*Widow v. Pearson.*  
1841 Pl. 167.

A testator gave a life estate in his freehold property to *C. T.*, and, after her decease, and in the event of her husband *J. T.* surviving her, he gave him an "annuity or yearly rent-charge" of 500*l.* payable quarterly, "with such power and remedy of distress and entry, and perception of rents, in case the annuity should be in arrear, as are reserved to lessors for the recovery of rents on leases for years;" and,

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“ The testator, *Samuel Jackson*, made his will and testament in writing, bearing date the 31st day of *May*, 1823, and thereby gave, devised, and bequeathed unto the defendants and their heirs, certain freehold hereditaments and premises therein particularly mentioned, and all and singular other the freehold and copyhold messuages, lands, and tenements wherever situate, (not being rent-charges for life or lives), with their rights, members, and appurtenances; To hold the same hereditaments unto the said defendants and their heirs: to the use of the said defendants, their heirs and assigns, during the life of *Charlotte Troughton*, wife of *Joseph Troughton*, of *Keppel Street, Russel Square*, in the said county of *Middlesex*, silk merchant, Upon trust, to preserve the contingent remainders thereafter limited, and also upon certain trusts therein mentioned during the life of the said *Charlotte Troughton*.

“ And from and after the decease of the said *Charlotte Troughton*, the said testator declared that the said defendants and their heirs should stand seised of the said hereditaments:—*To the use and intent that the said Joseph Troughton should, during his life, receive by and out of the said hereditaments and the rents thereof, one annuity or clear yearly rent-charge of 500l., clear of taxes, and without any deduction or abatement whatsoever, to be payable quarterly, on the usual feast days for payment of rent, the first quarterly payment to be made on such of the same feast days as should next happen after the decease of the said Charlotte Troughton, with such powers and remedies of distress and entry and perception of rents, in case the said annuity of 500l. should be in arrear, as are reserved to lessors for the recovery of rents on leases for years.*—Proviso, that in case, by means of the said *Joseph Troughton* becoming a bankrupt before or after the decease of the said testator, or taking *the benefit* of any then present or future act or acts of Parliament for the relief of insolvent debtors, or executing or entering into any deed or agree-

ment, or doing or committing any act or default, the said yearly rent-charge of 500*l.*, or any part thereof, should, or, but for that clause, would be conveyed, assigned, charged, or incumbered, then, and in any of such cases, the said yearly rent-charge of 500*l.* thereinbefore limited to the said *Joseph Troughton* should thenceforth cease and be void.

“ And from and after the decease of the said *Charlotte Troughton*, but subject and without prejudice to the said annuity or yearly rent-charge of 500*l.*, the said testator declared that the said defendants, their heirs and assigns, should stand seised of the said hereditaments so devised to them in trust as aforesaid; To the use of the first and other sons of the body of the said *Charlotte Troughton*, severally, successively, and in remainder, one after another, in tail male—To the use of the daughters of the body of the said *Charlotte Troughton*, in equal shares, as tenants in common in tail, with cross remainders between them in tail, in case there should be a failure of issue of the body or bodies of any one or more of such daughters; and if all such daughters but one should happen to die without issue, or if there should be but one such daughter, Then to the use of such one or only daughter in tail; and for default of such issue, then to the uses following, *viz.* As to one moiety of the said hereditaments, To the use of the said defendant *R. Jackson*, his heirs and assigns, for ever; and as to the other moiety, To the use of the defendant *W. Jackson*, and his assigns, for his life; remainder to the use of the said defendant *R. Jackson*, and his heirs, during the life of the said defendant *W. Jackson*, in trust to preserve the contingent remainders; remainder to the use of the first and other sons of the body of the said *W. Jackson*, lawfully begotten, successively, and in remainder, one after another, in tail male; remainder to the use of all the daughters lawfully begotten of the body of the said *W. Jackson*, in equal shares, as tenants in common in tail, with cross remainders be-

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tween or among such daughters in tail; and for default of such issue, then To the uses following, *viz.* To the use and intent that *Henry Johnson* and *Robert Johnson* therein mentioned, and their heirs and assigns, might receive out of the same moiety one annuity or yearly rent-charge of 600*l.*, to be issuing out of and charged upon the said moiety, and to be payable quarterly as therein mentioned, with full powers of entry and distress, and perception of the rents, in case the said annuity should be in arrear; and subject thereto, To the use of the said défendant *R. Jackson*, his heirs and assigns, for ever; but in case the said *R. Jackson* should die in his, the testator's, lifetime, then To the uses in the said will mentioned.

“ And the said testator directed that the said *Henry Johnson* and *Robert Johnson*, their heirs and assigns, should stand seised of the said annuity or yearly rent-charge of 600*l.*, upon the trusts following:—as to one equal fourth part thereof, upon trust for *Henry Trowbridge Wright*, during his life; and, after his decease, upon trust for all and every the child and children of his body, lawfully begotten, as tenants in common, in tail, with cross remainders between or among such children in tail; and for default of such issue, then upon the same trusts as therein declared concerning the three other undivided fourth parts.

“ Power for the trustees, at their discretion, during the minority of the said *Henry Trowbridge Wright*, to apply the said fourth part towards his education and advancement in life.

“ Proviso, that, if the said *Henry Trowbridge Wright* should convey, or agree to convey or incumber the said fourth part, or do any act whereby to assign or incumber the same by operation of law, then the said fourth part should, during the life of the said *Henry Trowbridge Wright*, be held in trust for the said *R. Jackson*, his heirs and assigns. And upon similar trusts as to the remain-

ing three-fourth parts, for *Thomas George Wright, Mary Anne Thompson Wright*, and *William Wright*; and on failure of such issue as aforesaid of their respective bodies, then, as to and concerning the said annuity or yearly rent-charge of 600*l.*, in trust for the said defendant *R. Jackson*, his heirs and assigns, for ever.

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“ And in subsequent parts of his will the testator gave sundry legacies and annuities, upon which the duty has been duly paid.

“ The testator, *Samuel Jackson*, died in the month of *March*, 1825, seised of the estates devised by his will. *Charlotte Troughton*, mentioned in the will of *Samuel Jackson*, died in the month of *August*, 1829, without having had any issue. *Joseph Troughton*, the husband of the said *Charlotte Troughton*, is now living. The defendants are and have been, since the death of the said *Charlotte Troughton*, seised in possession according to the estates limited to them respectively by the will of the said *Samuel Jackson*; and *Joseph Troughton's* rent-charge has been regularly paid from the death of his wife, the said *Charlotte Troughton*, to the time of filing the information, at the times in which the same is required to be paid by the said will, by the cheques of the defendants, to prevent the necessity of compelling the said *Joseph Troughton* to have recourse to the remedies given him by the will, and thereby incurring expense, which would fall upon the estate, as appears by the admissions entered into on both sides. The annual profits of the estates devised by *Samuel Jackson* exceed 500*l.*

“ The said *Joseph Troughton*, at the time of the death of the said *Charlotte Troughton*, was of the age of forty-one years, and is a descendant of a sister of the grandfather of the deceased *Samuel Jackson*; and according to a calculation agreed to on both parts, the value of 500*l.* for the life of *Joseph Troughton*, calculated as an annuity, according to the act 36 *Geo. 3*, c. 52, is 6509*l.*, the

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duty on which, calculated as aforesaid, is agreed to be the sum of 390*l.* 11*s.* 10*d.*; and the first instalment of the legacy duty, payable on such an annuity, is 97*l.* 13*s.*, the time for payment of which, if the same be payable, as alleged in the information, is expired."

The questions for the opinion of the Court were—

*First*, Whether the interest or benefit, passing by the will of the said *Samuel Jackson* to the said *Joseph Troughton*, was subject to duty within the meaning of the several statutes relating to the legacy duty.

*Secondly*, Whether the defendants to this information were the parties liable to the Crown for the payment of such duty, if any were payable; and,

*Thirdly*, Whether the defendants were liable to the payment of such duty upon this information, which charged them as jointly liable.

*Fourthly*, Whether either, and, if either, which defendant was liable to the payment of such duty upon this information and the issues joined on the pleas thereto.

*Amos*, for the Crown.—The legacy duty attaches upon the rent-charge or annuity given to *J. Troughton*. By stat. 55 *Geo.* 3, c. 184, Sched. Part 3, a duty is imposed "for every legacy, specific or pecuniary, of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person, &c. either out of his or her personal estate, or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof," &c. Now, this is a legacy out of and charged upon the testator's real estate; but if that clause be not sufficient, there is, at the end of the same article—"And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest out of any such estate or effects as aforesaid, shall be deemed legacies within the

meaning of this schedule;" which may be read either "a gift by way of annuity out of any real estate," or, "a gift of a partial interest or benefit out of any real estate." The mode of calculating such annuities is also mentioned in this statute, sect. 8, by a reference to the stat. 36 *Geo. 3*, c. 52, which contains a scale for the calculation of annuities. The first clause distinguishes between the cases where the legacies are charged out of the real estate, and the cases where real estate is to be converted into personal estate; and the words are so plain, that it is impossible to say that this is not a legacy out of real estate, or a gift by way of annuity out of real estate, or a partial interest or benefit out of real estate within the meaning of these clauses.

When the stat. 36 *Geo. 3*, c. 52, passed, no duty was payable upon a profit or charge upon land, and that statute does not alter the law in this respect. But that statute, in the 7th sect., shews clearly, that the Legislature well understood and had in view charges of this nature; for, if the legacy be to be paid out of the land, or if it be necessary to resort to the secondary fund, no duty is payable. This is important, to shew, that the Legislature well knew the nature of these charges. The stat. 45 *Geo. 3*, c. 28, s. 4, is the first act by which duty was imposed upon such charges as the present; and between that section and the clauses now relied on there is a difference, slight, but perhaps material to the decision of this case. The words of that section are, "or which shall have been charged upon or made payable out of any real estate;" whereas, in the clause relied upon, they are, "out of or charged upon his or her real estate;" which are stronger than the former, and fix the duty upon legacies, which partake more of the nature of real property, because the words "out of" imply that the party had a right to take the charge immediately out of the realty, without the intervention of any person to pay it over.

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Rent-charges are usually inserted in wills to answer a temporary purpose, and ordinarily confer no permanent interest in the land; and although there may be rent-charges in fee and in tail, yet these are not of ordinary occurrence, and cannot be supposed to have influenced the Legislature, because *ad ea quæ frequentius accidunt jura adaptantur*; and therefore the Legislature may very reasonably have concluded, that where there was no permanent interest in the land, there was no sound principle for distinguishing between a legacy payable out of real or personal property.

The second point is, whether, if the legacy duty be payable, these defendants, one of whom is tenant in fee, and the other tenant for life, with remainder over to his children, are the parties to be charged. This will depend upon the construction of the 45 Geo. 3, c. 28, s. 5, which enacts, "that the duties granted upon legacies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, &c., shall be accounted for, answered, and paid by the trustees to whom the real estate shall be devised, out of which the legacy or share of any monies arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy." Within the meaning of this clause these defendants are entitled to this estate, subject to the annuity. But it is said, that one of the defendants has but an estate for life, and should not be charged, and therefore it may be considered as if this were a devise to that defendant alone for life.

[*Bayley, B.*—Is the annuitant to have the annuity clear, or can the amount paid for duty be deducted out of the annual payments of the annuity?]

The Crown looks to the party who has the real estate subject to the annuity; but, as between the annuitant and

that party, the duty may be retained. This consideration does not touch the rights of the Crown. It would be highly inconvenient that every person who had a legal estate, every person who took each of the numerous terms in a settlement, every person who took a remote interest or had a *scintilla juris*, should be made a defendant and brought before the Court. It is more rational that he should pay the duty who pays over the annuity; and there is no injustice in such a course, because, as between him and the annuitant, the legacy duty would be deducted. If that be so, is there any objection to join tenants in fee and for life together, as if they were tenants in common? The same reason holds for charging both, as for charging a tenant for life, *viz.* that both receive the profits and pay the annuity.

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[*Bayley, B.*—It may be questionable whether the defendants, after the death of *C. Troughton*, do not take the legal estate as trustees. The rent-charge is granted with the usual powers of distress and entry, but the right of distress and entry is not immediately upon the death of *C. Troughton*, but only after the annuity becomes in arrear.]

In either view, the defendants are liable—whether as trustees, or persons interested in the land from which the annuity is to be paid.

The third point is, whether, if *R. Jackson*, the tenant in fee, only was liable, he can be charged upon this information. Upon this point, the question is, whether this is to be considered so far a proceeding upon a contract, as, that one defendant cannot be liable upon an information charging two. In debt upon a penal statute, one of several defendants may be convicted. *Bastard v. Hancock* (a). The liability does not proceed upon a contract between the King and the subject, but upon a duty of the latter; a

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principle laid down in *Bastard v. Hancock*, and recognised in *Hardyman v. Whitaker* (a).

*Follett*, for the defendants.—The effect of the will is, to give a legal estate in the rent-charge to *J. Troughton*, and the devise is to his use, that he may receive out of the estate this rent-charge. There is no direction that the trustees shall receive the rents and profits, and pay over the rent-charge; but *J. Troughton* is to receive the rent-charge, with the usual powers of distress and entry. It is, therefore, a case falling almost within the words of the statute of uses (b), and vests the legal estate in the rent-charge in the devisee. Such being the nature of the devise in question, is it within the meaning of the act imposing the legacy duty? It is not a devise of personal property, or a personal annuity charged upon or made payable out of the land, but a devise of the real estate.

The first act which imposed duty upon annuities is the statute 36 *Geo. 3*, c. 52, s. 7, and that provision attaches only upon that part which is charged upon and paid out of the personal estate. Then the statute 45 *Geo. 3*, c. 28, s. 4, for the first time imposes duty upon legacies charged upon real estate. Now, the object of the Legislature was, that all legacies, that is, all bequests of personal property, whether to be paid by the sale or raised out of the real estate, or whether to be paid merely out of the personal estate, should be charged with legacy duty; but there is nothing in this act to shew that the Legislature meant to charge a devise of real property. The words in the will are rent-charge, which is different from an annuity.

[*Bayley, B.*—Lord *Coke* says frequently, that, if you elect to charge the person, his land is exonerated, or, if to charge the land, then his person is exonerated.]

(a) 2 East, 573.

(b) 27 Hen. 8, c. 10.

The distinction is taken in *Blackstone's Commentaries* (a) thus:—an annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor. Therefore, if a man by deed grant to another the sum of 20*l.* *per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it, but it is a mere personal annuity." So *Littleton* (b), "also, if a man seised of certain land grant by a deed-poll, or by indenture, a yearly rent, to be issuing out of the same land to another in fee, or in fee tail, or for term of life, &c., with a clause of distress, &c., then this is a rent-charge; and if the grant be without clause of distress, then it is a rent-secke. And, note, that a rent-secke *idem est quod redditus siccus*, for that no distress is incident unto it;" "also, if a man grant, by his deed, a rent-charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind, and the distress detain until he be paid; but he cannot do or have both together, &c.; for if he recovers by writ of annuity, then the land is discharged of the distress, &c.; and if he doth not sue a writ of annuity but distrain for the arrearages, and the tenant sueth his replevin, and then the grantee avow the taking of the distress in the land in a Court of record, then is the land charged, and the person of the grantor discharged of the action of annuity (c)."

Such being the distinction between a rent-charge and an annuity, the word annuity in the act cannot by possibility mean a devise of real estate; it means a personal annuity. If the testator had bequeathed a legacy, or a sum certain annually, and had said that his real and personal

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(a) 2 Comm. 41.

(b) Sect. 218, 144. a.

(c) Lit. s. 219, 144. b.

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estate should be subject to pay it, that would have been a bequest by way of annuity, charged upon real estate, within the meaning of the act of Parliament.

The intention of the Legislature is illustrated by the case of *Hales v. Freeman* (a). There the devise was of the real estate, upon trust, with a bequest of an annuity, clear of all deductions, for the defendant's life; with a declaration, that the same should be payable quarterly &c., and secured on the real estates. That was an annuity, which the real estates would be liable to pay, within the meaning of the statute; but this is a rent-charge, a real estate, which would qualify the annuitant to vote, to act as a justice of the peace, or to sit as a member of Parliament. It has every incident of land, it will descend to heirs; it must be granted as land, and must be assigned in the same way. There is no difference between this and a freehold interest in land itself; then, if a freehold in land itself has always been exempt from legacy duty, why is this devise of a part of the real estate to be made subject to it?

The 5th section of the statute 45 Geo. 3, c. 28, also shews that the Legislature could not intend that legacy duty should attach upon such a devise as this. Would the trustees under this will have the power to take the rents and profits, and to pay the legacy duty out of the rents and profits in their hands? The defendants are not such trustees, because they have not the power to take the rents and profits, and the trustees have no interest either in the land or in the rent-charge. The trustees meant, are those who have power to sell the real estate, and to raise the legacies out of the real estate, and who would have power to pay the legacy duty out of the proceeds. There are in this case no persons answering that description. Again, in the alternative put by that section, who has the right to retain?

(a) 1 B. & B. 391.

Not the persons who have the legal estate in the land, nor the trustees; because the devisee himself has his remedy against the land. If the annuity were not paid, the devisee would distrain upon the land; and so there may be cases in which no person would have authority to pay the legacy duty to the Crown. It is conceded, that the annuitant is not liable to pay the duty, but only the party by whom the annuity is to be paid. In a rent-charge, however, there is no person to pay the annuity: the defendants may refuse to pay it, and the only remedy for the annuitant will be by distress and entry upon the land. This, therefore, seems to be decisive, that the Legislature could not intend a rent-charge to pay duty. Where an estate is devised to trustees to sell and pay an annuity, there may be a case in which the trustees, or the party in possession of the estate, may be compelled to pay; here they cannot.

The 45 *Geo. 3*, c. 28, s. 7, refers to and embodies the 36 *Geo. 3*, c. 52. By the 6th section of the latter act, the legacy duty, where not otherwise provided for, is to be paid by the persons having the administration of the funds of the testator, on paying or retaining the legacy; and the 27th section directs, that, upon payment of the duty, a stamped receipt shall be taken; and the 28th section imposes a penalty for not taking a receipt. Now, supposing in this case the annuity not to be paid by the defendants, but to be taken by the devisee out of the land, to whom is the receipt to be given?

The circumstance of one of the defendants being tenant for life only, is also an argument against the right of the Crown to legacy duty in this case.

[*Bayley, B.*—If he is entitled to deduct the amount of the duty paid, it can make no difference; he would only pay 500*l.* in the whole.]

But, if the devisee distrain upon the land, and take the amount of the annuity, and avow for it, and afterwards an

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information be filed against the tenant for life, he has nothing to pay the duty with. If a testator give an annuity of 500*l.*, and make his real estates subject to the payment of the annuity, and devise his lands to *A.* for life, with remainder to *B.*, it would be a case within the statute, and the tenant for life might make the deduction, because a Court of equity would direct a sale of the estates. But this is a distinct and different case, in which no relief in equity could be obtained.

The defendants are, therefore, not liable, because the Legislature did not intend to charge a devise of real estate; because the statutes do not contain machinery sufficient to enforce the payment of this duty; and because they have no power to retain the duty out of the money to be paid as the annuity.

*Amos*, in reply.—If the devisee were to take the whole sum by distress, and the person who takes subject to the annuity were compelled to pay the duty, he would have his remedy over, by action against the annuitant. In this case, however, the power of distress does not attach until the annuity be in arrear.

It is doubtful whether the devisee takes a legal estate, because the grantee cannot distrain till default made; but if he does take a legal estate, still it is within the statute, because it is an annuity “out of the estate.” But it is said, that this is not an annuity. It is payable annually, and the testator calls it such in the will. If, however, it is not, strictly speaking, an annuity, it is “payable annually, by way of annuity, out of real estate,” in the terms of the statute. Again, it is said, that, by the 36 *Geo.* 3, c. 52, s. 6, the duty is to be paid by the persons having the control of the funds. That enactment was applicable to legacies paid out of the personal estate; and, when imposing a new charge upon payments out of real estate, it was most convenient to render those liable, who, in the first instance, would

receive the rents and profits subject to the annuity. With respect to the hardship upon a tenant for life, it must be remembered, that he is not to pay out of his own pocket. If no default be made in the payment of the annuity, the money must first pass through the hands of the tenant for life; if default be made, and the whole be levied by the grantee, the tenant for life may have his remedy over by action.

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*Cur. adv. vult.*

Lord LYNTHURST, C. B., now delivered the judgment of the Court:—

The testator, *Samuel Jackson*, gave a life estate in his freehold property to *Charlotte Troughton*, and, after her death, and in the event of her husband *Joseph Troughton* surviving her, he gave him an annuity of 500*l.* a-year, payable quarterly; and, subject to that annuity, he gave his real estate in moieties to *Randle Jackson* and *William Jackson*, *Randle Jackson* having an estate in fee, and *William Jackson* an estate for life. The question is, whether the annuity of 500*l.* a-year, thus given to *Joseph Troughton*, is to be considered as a legacy, within the meaning of the acts of Parliament imposing duties on legacies.

It was contended for the defendants, that it was in fact real property; that it is a rent-charge, that is, a freehold interest in the party in whose favour it is granted; that it is as much real property, as far as relates to the 500*l.* a-year, as the estate out of which it issues; that it is as much real property, as the estate taken by *Randle Jackson* and *William Jackson* is real property; and that it was not the intention of the Legislature, in imposing this legacy duty, to impose any duty whatever upon real property. It is material, however, to consider the language of the act. The last act imposing a duty on legacies has these words, in describing what a legacy is: “a gift by way of annuity out of or charged upon his or her real estate.” In making use

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of those terms, the Legislature copied the words made use of in the 48 *Geo. 3*; and with a slight variation the same words occur in the 45 *Geo. 3*, in which the word 'payable' is inserted.

Now, the will, after giving the real estate to *Randle Jackson* and *William Jackson* as trustees, to the use of them, their heirs and assigns, during the life-time of *Charlotte Troughton*, the wife of *Joseph Troughton*, upon trust to preserve the contingent remainder, is as follows: "and, from and after the decease of the said *Charlotte Troughton*, the said testator declared that the said defendants, and their heirs, should stand seised of the said hereditaments, to the use and intent, that the said *Joseph Troughton* should, during his life, receive, by and out of the said hereditaments and the rents thereof, one annuity or clear yearly rent-charge of 500*l.*, clear of taxes, and without any deduction or abatement whatsoever, to be payable quarterly, on the usual feast days for payment of rent, the first quarterly payment to be made on such of the same feast days as should next happen after the decease of the said *Charlotte Troughton*, with such power and remedies of distress and entry, and perception of rents, in case the said annuity of 500*l.* should be in arrear, as are reserved to lessors for the recovery of rents on leases for years."

It appears to us, that this clause comes precisely within the terms made use of by the Legislature—a gift by way of annuity out of or charged upon his or her real estate. We cannot, therefore, take upon ourselves to say, as this clause comes precisely within the terms made use of by the Legislature, that the Legislature did not intend that it should apply to a case of this description.

The next question which was raised was, as to the parties by whom this legacy duty was payable. By the regulations with respect to the payment of the legacy duty on annuities, the value of the annuity is in the first instance estimated according to the tables contained in the 36 *Geo.*

3, c. 52. That amount is to be paid by four quarterly payments, and I think the highest charge of duty is 10 *per cent.*, and the extreme case eighteen years' purchase. It is obvious, therefore, upon making a calculation, that the money to be paid in respect of the first instalment must fall greatly short of the sum which the annuitant would be entitled to receive in that year. The person therefore paying the annuity is never required to be in advance, and he is allowed to retain that payment out of the payment made to the annuitant.

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Now, in this case, so far as relates to the persons who are interested in this land they are interested in moieties. One has a right to the estate for life, and the other has the estate in fee, but each moiety is liable to the payment of the annuity. Under such circumstances, we conceive that both the parties, the life tenant of the moiety and the party entitled in fee as to the other moiety, are jointly bound to pay this annuity. There is no hardship in this case on the tenant for life; for, as I have before stated, in directing our attention to the amount that is to be paid, it appears that the party making the payment is never required to be in advance, but the annuity is paid after retaining the payment due to the Crown. It appears to us, therefore, that no hardship can be complained of by the tenant for life, in being made jointly answerable with the tenant in fee to the payment of this annuity. We think that the judgment ought to be for the Crown.

Judgment for the Crown.

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HUGHES v. MARSHALL and Others.

To come within the treating act, 7 & 8 W. 3, c. 4, s. 1, the acts mentioned in that statute must be done by the candidate, or some person acting for him and on his behalf, in order to be elected.

Where supporters of a candidate gave orders to the landlord of a public-house, opened by the committee of the candidate, to supply others with refreshments, which were supplied on the credit of those who gave the orders:—*Held*, that it was not within the treating act.

If refreshments be supplied to voters, with a view to influence the election, it is bribery, and no action can be maintained for such supply.

*Quære*, whether moderate refreshment may not be supplied to out-voters who come from a distance.

**ASSUMPSIT** for meat, drink, and lodging supplied to the defendants and others at the request of the defendants, and for goods sold and delivered, and goods bargained and sold, and upon an account stated. Plea, the general issue.

It appeared at the trial, before *Patteson, J.*, at the last assizes for the county of *Salop*, that the defendants were supporters of Mr. *Slaney* at the election for *Shrewsbury*, in *July*, 1830, and had, during four days of the election, given orders, either personally or by written tickets, to the plaintiff, who kept the *Elephant and Castle* public house in that town, to supply with provisions, ale, wine, &c. upwards of 100 voters in the interest of Mr. *Slaney*, and also other persons who were not voters, and had likewise themselves taken refreshment at the plaintiff's house. After the election, the plaintiff's bill, amounting to 23*l.* 18*s.* 6*d.*, had been signed by the defendants, and admitted to be just. It appeared also from the examination of the plaintiff's witnesses, that the plaintiff's house had, in the first instance, been opened by Mr. *Slaney's* committee after the polling had commenced. The learned Judge was of opinion, that the case could not be within the treating act, 7 & 8 Wm. 3, c. 4, s. 1, unless the Jury were satisfied that the defendants were proved to have been agents to or identified with the candidate; and he directed the Jury to find a verdict for the plaintiff, if they were of opinion that the articles in question were supplied at the request and on the personal credit of the defendants. The Jury found a verdict for the plaintiff; and *Godson*, for the defendants, obtained a rule *nisi* for a new trial; against which—

*Curwood* shewed cause.—This is not a case within the letter or spirit of the treating act, because there was no

evidence to shew that the defendants were the authorized agents of the candidate. On the contrary, the Jury have found, that the supplies were made upon the personal credit of the defendants; and unless it be illegal for third parties, unconnected with the candidates, to supply the voters with refreshment, the plaintiff is entitled to recover. *Ribbans v. Crickett* (a), and *Lofthouse v. Wharton* (b), merely decide, that, for provisions supplied after the *teste* of the writ, at the request of the candidate, no action will lie; but there is no case which can carry the construction of the statute beyond that.

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*Godson* in support of the rule.—The contract is void at common law. Treating is a species of bribery, and bribery is a crime; *Rex v. Pitt*, *Rex v. Mead* (c); and, consequently, every contract founded on bribery is void. It is immaterial, in this view of the case, whether the bribery were committed with the knowledge of the candidate, or whether the parties bribed voted for the candidate on whose account they received the bribe. *Sulston v. Norton* (d).

The case is also within the treating act. The statute 7 & 8 Wm. 3, c. 4, applies not only to acts of treating by the candidate or his agents, but contains also the words “by any other means on his or their behalf;” which words must be construed to extend to all undue means mentioned in the clause, notwithstanding they be resorted to by strangers without the authority of the candidate.

[Lord *Lyndhurst*, C. B.—“On his or their behalf” must be understood to comprehend only acts resorted to at the desire or with the knowledge of the candidate.]

It sufficiently appears here, that the ways and means resorted to were with the knowledge of the candidate; for the house was in the first instance opened by his commit-

(a) 1 B. & P. 264.

Black. 380.

(b) 1 Camp. 530, n.

(d) 3 Burr. 1235; 1 Sir W. Bl

(c) 3 Burr. 1335; S. P. 1 Sir W. 317.

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tee. If proof of direct agency were required, the statute might in every case be evaded. But, independently of this, if the act be forbidden by the statute, it cannot form the ground of an action. *Langston v. Hughes* (a).

[*Bayley, B.*—If it be illegal in the candidate, it may perhaps be illegal in any other person. But there are other words in the statute which are very material. The act done must be in order to be elected, or for being elected. How can we say whether any portion of this bill is for the purpose of getting Mr. *Slaney* elected? It does not appear whether the voters had polled before they got refreshment. The argument would go to this, that, if a gentleman residing in the election town kept his house open, and gave refreshment to voters coming from a distance, he might be indicted for a breach of the act of Parliament.]

*Cur. adv. vult.*

LORD LYNTHURST, C. B., now delivered the judgment of the Court:—

We are of opinion, that the rule in this case for a new trial should be discharged. One point was, whether the case fell within the provisions of the treating act (b); and we are of opinion, on the evidence at the trial, that it did not; and in that respect we agree with the learned Judge who tried the cause. It is perfectly clear, from the language of that statute, that no transaction falls within the provision of the act, unless the candidate or person to be elected has some share in the transaction. The words of the statute are these: “that no person or persons hereafter to be elected, &c., after the teste, &c., shall or do hereafter, by himself or themselves, or by any other ways or means, on his or their behalf, or at his or their charge, before his or their election, &c., directly or indirectly give, present, or allow to any person or persons having voice or vote in such

(a) 1 M. & S. 593.

(b) 7 & 8 Wm. 3, c. 4.

election, any money, meat, entertainment, or provision, &c. in order to be elected, or for being elected, &c." Now it is perfectly clear from these words, that, to bring a case within the above provision, the acts mentioned in the statute must be done by the candidate, that is, not by him only, in his own person, but by him or by some person acting for him and on his behalf. It appears to us that there is nothing in the evidence in the present case to affect the candidate; and indeed the question was put to the Jury, whether the refreshments were supplied on the credit of Mr. *Slaney*, or on the individual credit of the defendants; and the Jury found that they were supplied upon the credit of the defendants. We think, therefore, that this case is not within the provisions of the treating act.

But another point is put independently of the treating act; and it is said, that it is not very material whether the case falls within the enactment of that statute or not; for that, if the plaintiff furnished these provisions with a view to influence the election, such conduct would be illegal at common law, and no action would be maintainable. Now, that is true, if such a case were made out. If bribery is brought home to the party, he is guilty of an offence at common law, and can maintain no action. But we do not find that the evidence is sufficiently clear to establish such a case. In the first place, it does not appear that the parties to whom these refreshments were furnished had not previously voted; in the next place, it does not appear whether they resided in the town or came from a distance, which might make it requisite for them to have moderate refreshment. It appears to us, therefore, that the evidence is not sufficiently strong to shew that the conduct of the defendants was illegal, even if the plaintiff had been proved to be aware of what they were doing. It is to be remarked also, that the expenses are inconsiderable when compared with the number of persons who shared the refreshments. There is nothing, therefore, to shew that

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bribery took place to influence the election. A considerable part of the bill, at all events, was incurred by the defendants themselves, and by persons who appear to have had nothing to do with the election; and for that they would be liable. So that, if the cause went down again for the purpose of inquiring whether the refreshments were supplied with a view to influence the election, there would be a verdict to that extent, at least, against the defendants. Upon the whole, however, we are of opinion that no case is made out to shew that the conduct of the defendants was illegal; and, if so, there is nothing to prevent the plaintiff from recovering, and this rule must be discharged.

Rule discharged.

*Ex parte TOMLINS.*

Where the amount is under 5*l.*, clerks of the peace &c. may verify their returns of estreats &c. to this Court by affidavit, without a commission or personal appearance.

ON the motion of *Starkie*, the Court allowed the town clerk of *Richmond* to verify his return to this Court of estreats, &c., by affidavit, without a commission or personal appearance, the amount being under 5*l.*; and directed that, for the future, where the estreats, &c., did not amount to 5*l.*, clerks of the peace should be at liberty to verify their returns to this Court by affidavit, without a commission or personal appearance (*a*).

(*a*) See *Ex parte Hodgson*, 2 Y. & J. 142. By the 3 Geo. 4, c. 46, s. 14, clerks of the peace, &c., are required to make and deliver into this Court a true and perfect duplicate or certificate, of all fines, &c.; and, by the 4 & 5 W. & M.

c. 24, s. 5, clerks of the peace, &c., on returning estreats, are required to take an oath, prescribed by that statute, which oath can only be administered by a Baron in open Court, or by commission. See 2 Y. & J. 146, n.

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## COALTSWORTH v. MARTIN.

**PLATT** having obtained a rule to shew cause for judgment as in case of a nonsuit—

*Humphrey* contended, that the motion was premature, because the plaintiff had not been ruled to enter the issue, and cited a rule of Court, 28th *May*, 1742 (*a*), by which it is ordered, “that, where issue is joined, the plaintiff do enter the issue upon record, *when required* by the defendant.”

In this Court, there is no rule to enter the issue; but four days' notice must be given before motion for judgment as in case of a nonsuit.

BAYLEY, B.—In this Court, there is no rule to enter the issue; but, before the defendant can move for judgment as in case of a nonsuit, he must give four days' notice of the motion (*b*).

The rule was subsequently discharged upon a *stet processus*.

(*a*) 1 Burt. 227.

(*b*) See Dax's Practice, 70, 76.

## DOE v. ROE.

**EJECTMENT** by landlord against tenant. The right of entry accrued in, and the declaration was intitled of, and served in this term.

*Colquhoun*, on the 24th *November*, moved for judgment against the casual ejector, and submitted that the stat. 1 *Will.* 4, c. 70, s. 36, applied to this case.

The stat. 1 *W.* 4, c. 70, s. 36, by which landlords may, where the right of entry accrues in or after *Hilary* or *Trinity* Terms, serve ejectments at any time within ten days after the right of en-

try accrues, applies only to issuable terms.

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BAYLEY, B.—That statute applies only where the right of entry accrues in or after issuable terms; in other cases, you must proceed as formerly (a).

(a) For the proceedings in entry accrues in or after *Hilary* or ejectment by landlords, where the *Trinity* Terms, see *Chitty's Practice*, 226—233. tenancy expires, or the right of

### JENKINS v. MALTBY.

A notice, that bail will be put in, and justify at the same time, must be a four days' notice, exclusive of Sunday, and must be served before eleven o'clock, A. M.

ON *Saturday*, the 12th *November*, after eleven o'clock, A. M., notice was given that bail would be put in on *Wednesday*, the 16th *November*, and would justify at the same time.

*John Jervis* objected, that a sufficient notice had not been given; because, by the rule of Court (a), there must be at least four days, exclusive of *Sunday*, after service of the notice, which must be served before eleven in the morning.

*Archbold* for the bail.

Time was granted to enable the defendant to give another notice (b).

(a) M. T. 1 W. 4, *ante*, Vol. 1, p. 469, pl. 1.

(b) See the form of the notice, *Chitty's Practice*, 324.

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## BENNINGTON v. OWEN.

**CHILTON** moved for a *distringas*. The affidavit stated four attempts to serve the defendant personally at his dwelling-house. On the three first occasions, the deponent saw a servant maid of the defendant, who told him, on the first occasion, that her master was not at home; and, on the second and third occasions, that her master had not been at home since the deponent last called. The same answer was received from the defendant's daughter on the fourth occasion, (the return day); and subsequently, the defendant's son informed the plaintiff's attorney that the defendant kept out of the way to avoid being arrested, and to enable him to sell his property for the benefit of his creditors, and that it was of no use to attempt to serve him, as he would keep out of the way until his property was disposed of.

Where, after four unsuccessful attempts to serve a *venire*, the defendant's son told the plaintiff's attorney that the defendant kept out of the way to avoid being arrested, in order that he might sell his property for the benefit of his creditors, the Court granted a *distringas*.

He contended, that the affidavit laid a sufficient ground for the *distringas*, and put it, not as a case in which the defendant kept out of the way to avoid the service of this particular process, as in *Pitt v. Eldred* (a), *Winstanley v. Edge* (b), *Godkin v. Redgate* (c), and *Whitehorne v. Simone* (d); but that the defendant kept out of the way to avoid all process, with a view to further a fraudulent disposal of his property.

The Court granted the writ

(a) 1 C. & J. 147.

(b) Id. 381.

(c) Id. 401.

(d) Id. 402.

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CANHAM v. FISK.

If land, with a run of water upon it, be sold, the water passes with the land, and the vendee, having used the water, though for less than twenty years, gains a title to it by appropriation, and may maintain an action for obstructing it.

Where costs are ordered to abide the event, neither party has the costs of the first trial, unless the verdicts are both for the same party—*Semble*.

**CASE** for diverting a water-course running through the plaintiff's garden, and used by him. Plea, not guilty.

At the trial, before *Garrow*, B., at the last Summer Assizes for the county of *Norfolk*, it appeared by the plaintiff's evidence, that, up to the year 1811 or 1812, the plaintiff's garden and an adjoining close, in which a stream took its rise and flowed through the garden, were the property of *Mrs. Holford*, and in one possession. About that time, the plaintiff purchased the garden, and continued to use the water, till the obstruction complained of. The defendant subsequently purchased the head of water, and diverted it. The learned Judge was of opinion that the unity of ownership destroyed the prescriptive right; and nonsuited the plaintiff.

*Kelly* moved for a new trial.—The Judge was mistaken in supposing that an unity of possession destroyed the plaintiff's right.

[*Bayley*, B.—An unity of possession merely suspends; there must be an unity of ownership to destroy a prescriptive right.]

The plaintiff had a title by appropriation and enjoyment, quite sufficient to sustain the action, without any prescriptive right. *Williams v. Morland* (a).

The Court granted the rule, and—

*B. Andrews* and *Prendergrast* shewed cause.—Upon the facts of this case, the direction of the learned Judge was correct. Until 1811 or 1812, both closes belonged to *Mrs. Holford*, and both were in one occupation. There was,

(a) 2 B. & C. 910; 4 D. & R. 583.

therefore, no ground for a prescriptive right, nor for the presumption of a grant.

[*Bayley, B.*—If the owner of two closes sell one with a run of water upon it, can the vendor, or any other person claiming under him, obstruct or divert that water?]

That must depend upon the terms of the conveyance, which was not produced, and must be taken not to favour the plaintiff's claim.

[*Bayley, B.*—An unity of ownership would destroy a title by prescription; but here, the plaintiff had enjoyed the water since 1811.

*Lord Lyndhurst, C. B.*—The plaintiff bought the land with the water upon it; and if the conveyance were silent as to the water, still the water would pass by the grant of the land.]

There are but three ways of acquiring such a right—by prescription, which is disposed of by the unity of ownership; by actual grant, which was not produced; and by lost grant—and there was no evidence from which to presume a lost grant, the enjoyment not having continued for twenty years. The case was put to the Jury upon the prescriptive right merely.

[*Bayley, B.*—There is a fourth mode of acquiring such a right, *viz.* by appropriation. If a man find water running through his land, he may appropriate it, and thus acquire a title to the water. *Bealey v. Shaw* (a).

*Lord Lyndhurst, C. B.*—The plaintiff has been in possession of this garden since 1811. That possession is evidence of a fee which could only pass by grant, and a grant of the land would carry the water. If the conveyance had been produced, and had been silent as to the water, still, the conveyance would have passed the water which flowed over the land. Are we to assume that the water was excepted out of the conveyance, merely because the conveyance was not produced?

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(a) 6 East, 208.

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*Bayley, B.*—If I build a house, and, having land surrounding it, sell the house, I cannot afterwards stop the lights of that house. By selling the house, I sell the easement also. This land is purchased with the water running upon it, and the conveyance passes the land with the easements existing at the time.]

*Kelly and C. Austen*, (in support of the rule), were stopped by the Court, who made the rule absolute, and directed the costs to abide the event.

*B. Andrews* said, that the practice of this Court and the *King's Bench* differed; and that the plaintiff would, by the practice of this Court, be entitled to the costs of both trials, if he succeeded in the new trial—the costs abiding the event. But—

*Per Lord LYNDHURST, C. B.*—That must not be considered to be the rule of this Court. I am of opinion, that the practice upon this point is the same as in the Court of *King's Bench*; and that, where the costs of the first trial are to abide the event of the second, neither party will be entitled to the costs of the first trial, if the party who succeeds on the first trial fails on the second. The Master says, that such is the practice of this Court.

Rule absolute—the costs to abide the event (*a*).

(*a*) It was frequently stated by the late Master, that, where costs were directed to abide the event, the party succeeding upon the second trial had the costs of both trials, though the verdicts were conflicting. By the practice of this Court, if there be no order upon the subject of costs, the party succeeding upon both trials

has the costs of both; *Loader v. Thomas*, 1 C. & J. 54; but, if the verdicts be different, neither party is entitled to the costs of the first trial. Dax's Practice, 149. If the result is to be the same where no order is made, and where the costs are to abide the event, there seems to be no reason for making a special order upon the subject.

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## HITCHCOCK v. BADHAM.

**T**HE defendant's wife carried on the business of a milliner, independently of her husband; and, in *March*, 1830, was supplied with the goods for which this action was brought. In *September*, 1830, the defendant left *England* for *Hobart's Town*, where he remained. In this term the plaintiff issued a *venire* against the defendant, which was served by leaving a copy at the dwelling-house of the wife, and, upon the Sheriff's return, issued a *distringas de cursu* to levy 40s.; and a levy was made upon goods at the dwelling-house of the wife.

Where a *venire* against *A.*, who was abroad, to recover for goods supplied to the wife of *A.* in her separate business, was served at the dwelling-house of the wife, and, upon a *distringas* issued *de cursu*, a levy was made upon the goods at the dwelling-house of the wife, the Court set aside the service of the *venire*, and the *distringas*, with costs.

*Steer* obtained a rule to shew cause why the service of the *venire*, and the *distringas*, should not be set aside for irregularity, and the issues returned.

*Follett* shewed cause, and contended, that, as the goods, in respect of which the action was brought, were supplied to the defendant's wife in the course of her separate business, the goods in that business might be taken, to compel an appearance to the common law process, which did not require personal service.

*Per Curiam*.—By suing the husband you say that he is liable for the goods supplied; and that the goods are his, and though he is absent from the country, and can know nothing of the process, you take his goods to compel an appearance.

Rule absolute, with costs, no action to be brought.

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REX *aux.* HOLLIS *v.* BINGHAM.

An extent in aid having issued, the Crown debtor and debtor paravaile referred all matters in difference between them to arbitration; afterwards, and before the award was made, the debtor paravaile took the benefit of the Insolvent Debtors' Act, and inserted in his schedule the debt due to the Crown debtor:—The Court set aside the award, because the prosecutor was not entitled to prerogative privilege to secure him from the effect of a public statute upon the private agreement of the parties.

**HOLLIS** being indebted to the Crown, and *Bingham* to *Hollis*, an extent in aid of *Hollis* issued against *Bingham* in 1817, under which *Bingham's* property was seized. *Bingham* appeared and traversed the inquisition; when all matters in difference between *Hollis* and *Bingham* were referred by recognizance to Mr. *Denman*; and, upon security being given by *Bingham*, a writ of *amoveas manus* issued to liberate his property seized under the extent. Mr. *Denman* did not undertake the reference, and Mr. *Merewether* was substituted as arbitrator for him in 1821, by rule of Court (a). In 1822, and before Mr. *Merewether* made his award, *Bingham* took the benefit of the Insolvent Debtors' Act, and inserted in his schedule the debt due to *Hollis*. Upon this ground, amongst others, *Follett* obtained a rule *nisi* to set aside the award, and cited *Marsh v. Wood* (b).

*Manning* shewed cause.—If this were an action of debt, or of *assumpsit*, the case of *Marsh v. Wood* would apply; but it is a proceeding by prerogative process, and therefore that case is inapplicable. It is clear, that a certificated bankrupt is not entitled to his discharge from a commitment on an extent, the Crown not being bound by the statutes of bankrupts; *Rex v. Pixley* (c); and for the same reason, a person discharged under an insolvent act is not entitled to his discharge as against an extent (d). The rule is the same with respect to extents in chief and in aid, in the latter the Crown is a trustee for the Crown debtor.

[*Bayley, B.*—Does it appear whether the Crown debt

(a) See 3 Y. & J. 101.

(b) 9 B. & C. 659; 4 M. & R. 504.

(c) Bunb. 202.

(d) West, 95.

has been satisfied? *Hollis* is the debtor, and should state that.]

That does not appear, but is immaterial, because, when seized, it becomes a debt by record, which can only be discharged by record. The writ of *amoveas manus* is a discharge *pro tanto*, that is, it vacates the execution, but is not tantamount to an entry of satisfaction on the roll.

[Lord *Lyndhurst*, C. B.—It becomes a debt to the Crown by two steps. *Hollis* is a debtor to the Crown, and *Bingham* to *Hollis*—when the first is removed, the other fails also.

*Bayley*, B.—Cannot we interfere when we see that that which is treated as a Crown debt becomes only a private debt? It is the province of the Court of *Exchequer* to watch over the rights of the Crown, and also to see that the Crown process is not abused to the prejudice of the subject. With what view was the late rule framed (*a*), except to attach where the Crown was satisfied?]

That rule is not retrospective. When once seized, the debt becomes a Crown debt, and the Crown debtor is entitled to prerogative process; and there are many cases which decide, that, though the debt to the Crown be satisfied, the Crown debtor may proceed by prerogative process against his debtor *paravaile*.

[*Bayley*, B.—I am aware of no instance in which the Crown debtor has proceeded where the Crown debt was satisfied; and circumstances have occurred, which, as between the Crown debtor and debtor *paravaile*, would discharge the latter.]

By the old practice (*b*), if the debtor owed the Crown but one shilling, he might proceed against others by prerogative process to any extent. The stat. 57 *Geo.* 3, c. 117, s. 6, contains an express provision for the discharge of insolvent Crown debtors under extents in aid; which clearly

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(*a*) *June* 22, 1822, *Man. Pract.* 313.

(*b*) See 57 *Geo.* 3, c. 117.

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shews that such extents are not affected by the Insolvent Debtors' Act.

*Dampier and Follett, contra.*—There are many cases in which a debtor paravaile has been sued after the Crown debt was satisfied, but none in which the effect of a public statute has been defeated by an extent in aid. But the prosecutor cannot, upon this application, treat this as a Crown debt. The reference is between the parties, without the authority of the Crown. It is treated as a private debt—it is inserted by the defendant in his schedule; and, by the insolvency, the submission is revoked. *Marsh v. Wood.*

LORD LYNTHURST, C. B.—The object of this application is to discharge the debtor paravaile from the consequences of an act done by him and the Crown debtor, without the authority of the Crown. The parties treat this as a private debt, and take upon themselves to refer the amount. Taking it as a private debt, the defendant is discharged from it by operation of the Insolvent Debtors' Act, the effect of which is, that the award is vacated.

BAYLEY, B.—The extent seized the debt due to *Hollis* from *Bingham*, as it existed at that time; subsequently, the parties agree, without the consent of the Crown, to refer the amount of that debt. By setting aside this award, therefore, we merely put the parties in the situation in which they stood at the time when the debt was seized; and if, by any process, the payment of that debt can be enforced, neither the Crown nor *Hollis* will lose the benefit of it.

When I find authorities to establish, that, when a debt has been seized and the Crown debt is afterwards satisfied, and circumstances occur, which, as between the debtor and creditor, would bar the debt, the Crown debtor may

nevertheless proceed by prerogative process, and say that his debt is not discharged, I shall be convinced, and bow to the decisions; but, until such authorities are produced, I must think such a proposition most unreasonable.

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GARROW, B.—I am of the same opinion, and think that no authority can be produced, which would entitle the prosecutor to proceed against the debtor paravaile, under circumstances like the present.

BOLLAND, B.—The parties before us are *Hollis*, claiming a debt, and *Bingham*, resisting it. They refer the amount. The Crown is no party to that reference; and *Bingham* having been discharged under the Insolvent Debtors' Act, calls upon us to throw around him the protection of that statute. We do not decide whether the claims of the Crown are satisfied, or what are the rights of the prosecutor in respect of the Crown debt; but merely restore the parties to the situation in which they were before the private agreement, which private agreement has been discharged by the subsequent circumstances.

Rule absolute.

D. ALEXANDER and Others v. BARKER.

*ASSUMPSIT* for money lent to and paid for the defendant, and for interest. Plea—*Non assumpsit*.

The cause was tried at the last assizes for the county of *Suffolk*, before *Garrow*, B.

Where *A.* applied to *B.*, a member of a banking establishment, for a loan of money, which *B.* advanced out of

funds in which he and his partners were jointly interested:—*Held*, that the firm might sue *A.* for money lent.

The rejection of evidence, which, if admitted, would merely prove a fact, sufficiently established by other evidence, is no ground for a new trial.

Submitting to a nonsuit in deference to the opinion of the Judge at the trial, which opinion is incorrect, does not estop the plaintiff from moving to set aside such nonsuit.

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The plaintiffs were bankers at *Ipswich*. In the year 1824, a joint stock company was formed, called the "*Ipswich Steam Navigation Company*," of which the first plaintiff, *D. Alexander*, was the treasurer, and the defendant a subscriber for ten shares. The defendant paid two calls of 10 *per cent*. In *June*, 1825, there was a further call of 10 *per cent.*, upon which the defendant wrote to the plaintiff, *D. Alexander*, the following letter:

" 25th *July*, 1825.

" Sir—I was informed some time ago, by my friend Mr. *Cubitt*, that you were kind enough to say that you had no objection to pay the future calls for me on ten shares which I hold in the *Ipswich Steam Navigation Company*, on my paying you interest at the rate of five *per cent. per annum*, and lodging my shares, with twenty *per cent.* paid thereon, as your security, which I shall be very happy to do, and shall feel obliged by your paying the present and any future call or calls which may be made on the said ten shares; and I will transfer or convey them to you as security, in any way you may prefer."

This letter was forwarded through Mr. *Cubitt*, the secretary of the Company, and was accompanied with another letter to that gentleman, as follows—

" I have received your notice of a further call on the *Ipswich Steam Navigation Company's* shares, and I avail myself of the offer of Mr. *Alexander* to pay my proportion, charging me interest thereon at the rate of five *per cent. per annum*. Will you, therefore, oblige me by stating in what way I am to convey my shares to him as his security, &c."

The plaintiffs then proved that the sum of 200*l.*, for the third and fourth calls of 10 *per cent.* upon the defendant's

shares, was paid by them, and placed to the credit of and drawn out by the Steam Navigation Company. They proposed, also, to produce the pass-book between the Company and the plaintiffs, as bankers, to shew that a gross sum, including that sum, had been paid to the Company.

The learned Baron was of opinion that this book was not admissible in evidence; and that the action should have been brought in the name of *D. Alexander* alone; and nonsuited the plaintiffs.

*Storks*, Serjt., obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial had. He contended, that the pass-book was admissible, because it was an entry of transactions between the Company, of which the defendant was a member, and the plaintiffs; and that, independently of the pass-book, there was sufficient evidence to entitle the plaintiffs to recover. *Garrett v. Handley* (a); *Cothay v. Fennell* (b).

*B. Andrews* and *C. Austin* shewed cause.—The pass-book was properly rejected. The object was to affect the defendant with a knowledge that the loan was made by the plaintiffs as partners, and not by *D. Alexander* alone; but it was inadmissible for that purpose, being a mere entry between the plaintiffs, as bankers, and *D. Alexander*, as treasurer of the Company.

[*Lord Lyndhurst*, C. B.—It is merely used to shew that the plaintiffs paid up all the instalments. It is evidence against the Company, and therefore against every individual member of the Company, of that fact. How far it would affect the result is another question.]

The question is, whether the money was advanced by the plaintiffs with the knowledge, or by the request, of the defendant. The pass-book merely proves the advance,

(a) 4 B. & C. 664; 7 D. & R. 144.

(b) 10 B. & C. 671.

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which was already sufficiently established without that evidence; and therefore the pass-book could have no influence as to the verdict; and the Court will not interfere, though the pass-book were admissible. *Horford v. Wilson* (a).

But the plaintiffs cannot now raise the objection. They acquiesced in the nonsuit, and cannot now say that the learned Judge was mistaken. *Butler v. Durant* (b), *Robinson v. Cook* (c), *Elsworthy v. Bird* (d).

[*Bayley, B.*—I have heard Lord *Tenterden* say, over and over again, that, if he nonsuited upon an opinion intimated at the trial, in which the counsel acquiesced, and was wrong, the Court ought to set aside that nonsuit. It would be very hard if it were otherwise, because counsel must, in that case, at their peril, decide whether the Judge was right or wrong.]

By this course, the plaintiffs see the mode in which the defendant shapes his case, and thus gain a considerable advantage. Moreover, if the plaintiffs had insisted upon the evidence going to the Jury, the defendant might, perhaps, have adduced evidence in answer to the plaintiffs' case.

Upon the evidence, however, the nonsuit is right. The contract is between *D. Alexander* alone and the defendant, though the money is advanced by the firm. There is nothing to shew that the advance was so made with the knowledge or by the consent of the defendant. On the contrary, he treats with *D. Alexander*, not as a member of the firm, but in his individual capacity; and many reasons may induce an individual to deal with one member of a firm in preference to a transaction with a partnership. The decision in *Garrett v. Handley* proceeded upon the ground, that the intention was, that the guarantie should

(a) 1 Taunt. 12.

(b) 3 Taunt. 229.

(c) 6 Taunt. 336.

(d) M'Clel. 69.

be for the benefit of the firm. This is apparent from the first decision of that case (a).

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*Storke*, Serjt., and *Kelly*, in support of the rule, were stopped by the Court.

**LORD LYNCHURST, C. B.**—If this question had turned solely on the rejection of the pass-book, I should have been of opinion that there ought not to have been a new trial, because the pass-book would have proved no more than was sufficiently in evidence without it.

On the general question, however, I am of opinion that the plaintiffs ought not to have been nonsuited. Where an application is made to a banker, a member of a firm, for a loan, and the advance is made by money of the firm in which the partners are jointly interested, the action may be brought by all the members of the firm.

But it has been said, that the learned Judge was not applied to, or desired, to let the case go to the Jury; and we have been referred to cases where the Courts have refused to set aside a nonsuit, after the counsel at the trial have acquiesced in being nonsuited, and have not insisted on the case going to the Jury. In those cases, however, the Courts thought that the opinion expressed by the Judge at *Nisi Prius* was correct; and the principle of those cases does not apply, where we think that the opinion expressed by the learned Judge at the trial was incorrect. Where, at the trial, a learned Judge says, that, if the case goes to the Jury, he shall express a certain opinion, which the Court thinks was incorrect, we are bound to consider it as if the case had gone to the Jury with that direction; and in such a case the Court may interpose.

**BAYLEY, B.**—I think that there ought to be a new trial in this case, not on the ground of the rejection of the pass-

(a) 5 D. & R. 319, 3 B. & C. 462.

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book, which appears to me to be irrelevant to the question in dispute in this cause; for it could only have shewn that a gross sum of money had been paid to the Company by the plaintiffs; but whether that included the money advanced to the defendant would not have appeared from the pass-book, and if it would, whether the advance was made by *D. Alexander* alone, or by the firm, would not have been elucidated by that entry: but, on the testimony in the case connected with the letter of the defendant, it seems to me that the plaintiff was entitled to recover. I am the less surprised that the learned Judge should have considered *D. Alexander* as the person with whom the defendant contracted, and who alone could maintain the action, because I remember that it was at one period the impression of Lord *Ellenborough*, that, where money was lent by a partner, the action must, in all cases, be brought by the individual with whom the contract was made; but he was afterwards convinced of what is doubtless the true rule, *viz.* that where a contract is made by one on behalf of others, the action may be brought in the name of the principals.

I have no doubt in this case but that this action is maintainable by the plaintiffs; and in that opinion I am fortified by the case of *Garrett v. Handley*. Here, *D. Alexander* stood in the double capacity of an individual and a member of the firm. *Barker* wanted an advance of money, and to him it was quite immaterial by whom the advance was made, whether by *D. Alexander* alone, or by the house of which he was a member. He applies to *D. Alexander* to make the advance; he does not qualify that application, and say, you may be a member of a firm, and I will deal with you only, and will not be answerable to other persons; but he makes his application without any qualification. By thus applying generally, he entitles *D. Alexander*, if he make the advance, to place him in the situation of being answerable to him in either of his capacities, according to that in which he makes the advance.

From the testimony, it appears that the advance was made by *D. Alexander*, not individually, but with the money of the firm. He accepted, therefore, the application for the advance, not as an individual, but in his capacity as a member of the firm. In *Garrett v. Handley*, the contracting partner first brought the action in his own name; but it appeared that the advance was made by the house, and the Court said, you did not make the advance, and cannot maintain the action; another action was then brought in the name of the firm, and the Court, being of opinion that the guarantie was intended to apply to advances made by the firm, thought that the action was maintainable. The language of that guarantie was much more pointed than this letter. It was addressed to an individual, and was to this effect:—"I understand from Mr. G. that *you* have had the goodness to advance 550*l.*, &c. upon my assurance, which I hereby give, that provision shall be made for repaying *you* this sum, &c.;" but the advance was not made by the individual alone; and it was holden that the firm by whom the advance was made ought to sue. It appears to me, therefore, that the plaintiffs were the persons who might and ought to sue in this case.

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Upon these grounds, therefore, and because in this instance the learned Judge would have given a direction to the Jury, which would have led to a wrong result, I am of opinion that there ought to be a new trial; and that the counsel who acquiesced in the nonsuit, and did not desire that the case should be left to the Jury, but submitted out of proper respect to the learned Judge, is not now precluded from taking the objection.

GARROW, B., concurred.

BOLLAND, B.—I am of the same opinion; not on the ground of the rejection of the pass-book, which carries the case no further, but on the authority of *Garrett v.*

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*Handley.* If one party applies to another for the loan of money, and is so much in the dark as not to know whether the party to whom he applies is the member of a firm or not, the applicant must take his chance as to whether the advance is made by the individual or by the firm; but he may, if he choose so to do, guard himself, by saying expressly that he deals with him individually. I am, therefore, of opinion that the rule for a new trial should be made absolute.

Rule absolute.

EDENSOR *v.* HOFFMAN and Another.

By the late rule of Court there is no imparlance, where the writ, appearance, and declaration are of the same term, if the declaration be delivered on or before the last day of term; but if the writ and appearance be of one term, and the declaration of another, the defendant is entitled to an imparlance notwithstanding the late rule.

If the defendant, being entitled to an imparlance, take out a summons for time to plead, which is indorsed by consent,

he waives the imparlance, and the plaintiff may sign judgment for want of a plea before the enlarged time for pleading has expired, if no order be drawn up.

THE writ in this case was returnable, and the appearance entered, in *Trinity* Term last. The declaration was delivered on the 16th *November*, intitled of *Trinity* Term, and indorsed to plead in four days. On the 18th *November*, a summons was served, for a month's time to plead, which was indorsed by consent for ten days' time to plead. No order was drawn up; and, on the 22nd *November*, the plaintiff signed judgment for want of a plea.

*Chilton* obtained a rule to shew cause why the judgment should not be set aside for irregularity.

*R. V. Richards* shewed cause.—The defendant was not entitled to an imparlance. By the late rule (a), it is ordered, that, upon every declaration delivered or filed on or before the last day of any term, the defendant, whether in or

(a) *Ante*, Vol. 1, p. 471, pl. 7.

of any prison, shall be compellable to plead as of such term, without being entitled to any imparlance. *Exch. of Pleas, 1831.*

[*Bayley, B.*—That is, where the writ, appearance, and declaration are of the same term. Before the late rule, the defendant was not bound to plead as of the term in which the declaration was delivered, unless the declaration was delivered on or before the fourth day exclusive before the end of the term in which the writ was returnable. By the rule, the last day is substituted for the fourth day before the end of the term.]

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But the summons and indorsement were a waiver of the imparlance.

[*Bayley, B.*—It amounts to an admission that the plaintiff was entitled to a plea as of that term.]

*Chilton, contra.*—The parties are *in pari delicto*. The defendant meant to claim an imparlance, but took out the summons by mistake; and the plaintiff, having consented to give ten days time to plead, ought not to have signed judgment. A consent indorsed on a Judge's summons binds neither party, unless the order be drawn up, and served pursuant thereto. *Joddrel v. — (a).*

LORD LYNTHURST, C. B.—The judgment is regular, and can only be set aside upon payment of costs.

Rule accordingly.

(a) 4 Taunt. 253.

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IN THE EXCHEQUER CHAMBER.

(*In error from the Court of King's Bench.*)

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*T.*, seised for life, granted an annuity to *W.*, and, to secure the annuity, in consideration of money, "granted, bargained, sold, and demised" to *F.* certain premises for a term of years, upon trust, in case the annuity should be in arrear, to raise the annuity by distress, or by sale or mortgage of the premises: afterwards, *T.* granted another annuity to *H.*, with a power of distress upon the same premises. *H.* distrained, and avowed the taking for arrears of the annuity under his deed: the tenant sets up the demise to *F.*, but did not shew under whom he, the tenant, was in possession, or that *F.* had entered upon the premises, or had

**REPLEVIN** by the defendant in error, (the plaintiff below), for cattle, goods, and chattels, and growing corn, pulse, and hops.

Cognizance by the plaintiff in error, (the defendant below), as bailiff of *W. Hodgson*, that one *J. Taylor*, before the said time when &c., was seised of the premises in the declaration mentioned, and in which &c., in his demesne as of fee; and being so seised, before &c., on the 10th *July*, 1797, made his will, &c., and thereby, amongst other things, gave and devised the said premises, in which &c., with the appurtenances, unto *C. H.* and *J. B.*, their heirs and assigns, to the several uses &c., in the will mentioned; that is to say, subject to and charged and chargeable with the payment of the several annuities and legacies thereafter by him given, and to the powers and remedies therein contained for securing the same, to the use and behoof of *G. Taylor* and his assigns, for and during the term of his natural life; and the said *J. Taylor* afterwards, and before &c., to wit, &c., died seised of the premises, without altering his will; whereupon the said *G. Taylor* then and there became and was seised of the premises, in which &c., for the term of his natural life; and being so seised, afterwards, and before &c., to wit, &c., by indenture between *G. Taylor* of the first part, *W. Hodgson*

elected to treat the demise as operating by the stat. of uses:—*Held*, that the demise to *F.* operated as at common law, and without an entry was no bar to the distress by *H.*

*T.* granted an annuity, charged upon certain premises, with a power, in case the annuity should be in arrear, to enter upon the premises and distrain for the annuity, "and the distress then and there to detain, manage, sell, and dispose of, in the same manner and in all respects as distresses for rents reserved upon leases for years might be detained, managed, sold, and disposed of, and as if the annuity were a rent reserved upon a lease:"—*Held*, that growing crops could not be distrained under this power.

of the second part, and *T. C.* of the third part, the said *G. Taylor*, for the considerations therein mentioned, gave, granted, and confirmed unto the said *W. Hodgson*, his executors, administrators, and assigns, one annuity or clear yearly sum of 166*l.* 2*s.*, to be charged and chargeable upon, and issuing and payable, and had and received, and taken from and out of the said premises, in which &c., and from and out of every part and parcel of the same, with their appurtenances; to have and to hold the said annuity or yearly sum of &c., unto the said *W. Hodgson*, his executors, &c., thenceforth for and during the term of ninety-nine years, if the said *G. Taylor* should so long live; the said annuity to be paid at &c., on &c., quarterly, without any deduction, &c. And the said *G. Taylor* thereby granted unto the said *W. Hodgson*, his executors, &c., that when and as often as the said annuity should be in arrear for twenty-one days after the day of payment, then, and so often, and from time to time, it should be lawful to and for the said *W. Hodgson*, his executors, &c., into and upon the said messuages, lands, and premises, thereby charged, &c., to enter, and distrain for the said annuity or yearly sum, and all arrears thereof; and the distress then and there to detain, manage, sell, and dispose of, in the same manner and in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity or yearly sum of &c., thereby granted, was a rent reserved upon a lease for years; to the intent that the said *W. Hodgson*, his executors, &c., should therewith be fully satisfied and paid the said annuity or yearly sum of &c., and all arrears &c., and all costs &c.: averment that, in the lifetime of *G. Taylor*, to wit, on &c., a large sum of money, to wit, &c., became due for the said annuity, wherefore he took the cattle, goods, and chattels, corn, pulse, and hops in the declaration mentioned, as a distress for the said annuity, &c. The second avowry omitted the statement of the will of *J. Taylor*, but alleged, that *G. Tay-*

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*lor* was seised of the premises in which &c., for his natural life, and, being so seised, granted the annuity, with the power of distress, in the same terms as in the first avowry.

Plea in bar to the first avowry.—That, before the sealing and delivery of the indenture in the first cognizance mentioned, and the indenture thereafter mentioned, the said *G. Taylor* was seised in his demesne, as of freehold for life, of and in the premises in the declaration mentioned; and being so seised, before the making of the indenture in the cognizance mentioned, to wit, &c., by a certain indenture made between the said *G. Taylor* of the first part, one *M. Walton*, *M. Walton* the younger, *J. Dempster* and *D. Witney* of the second part, and *J. Walton* of the third part, and one *G. Fletcher* of the fourth part, after reciting as therein mentioned, the said *G. Taylor*, in pursuance of the agreement therein contained, and in consideration of &c. to the said *G. Taylor* paid by the said *J. Walton* as agent, as in the said indenture mentioned, did give, grant, and confirm unto the said *J. Walton*, his executors, &c., one annuity or clear yearly sum of 413*l.* 12*s.*, to be charged and chargeable upon and issuing, payable, had, received, and taken from and out of certain premises in the said last-mentioned indenture mentioned, and, amongst others, from and out of the said premises, in which &c., to have, receive, and take, and enjoy the said annuity, and every part thereof, unto the said *J. Walton*, his executors, &c. from thenceforth, for and during the term of ninety-nine years; if the said *G. Taylor* should so long live; In trust, nevertheless, for the said *M. Walton* the elder, *M. Walton* the younger, *J. Dempster*, and *D. Witney*, respectively, and their respective executors, &c., as tenants in common &c.; and for the better securing the annuity, for the consideration in the indenture mentioned, and of 10*s.* to the said *G. Taylor* paid by the said *G. Fletcher*, the said *G. Taylor*, on the nomination and by the direction and appointment of &c., (the parties of the second part,) did grant, bargain, sell, and demise unto the said *G. Fletcher*,

his executors, &c., certain premises in the said last-mentioned indenture mentioned, and, amongst others, the said premises, in which &c., to have and to hold the same unto the said *G. Fletcher*, his executors, &c., from the day next before the day of the date of the same indenture, for and during and unto the full end and term of ninety-nine years, if the said *G. Taylor* should so long live, without impeachment of waste, so far as the said *G. Taylor* could grant the privilege; upon the trusts in the indenture expressed, and, amongst others, upon trust, that in case, and when and as often as the said annuity of &c., or any part thereof, should be in arrear for the space of thirty days next after the days of payment, the said *G. Fletcher* might and should, out of the rents and profits of the said hereditaments and premises thereby granted, by mortgage or sale thereof or of a competent part thereof, in case there should not be sufficient distresses upon the premises, for all or any part of the said term of ninety-nine years determinable as therein mentioned, or by bringing actions against or making distresses upon all and every, or one or more of the then present or future tenants of the said hereditaments and premises, for the recovery of the rents then in arrear, or by making entries upon the said hereditaments and premises in and by all and every or any one of the said ways and means, or by any other lawful and reasonable ways whatsoever, levy and raise such arrears of the said annuity of &c., as from time to time should become due and remain unpaid, together with all costs, &c.: averment, that the said last-mentioned indenture was, at the time of making the said indenture in the cognizance mentioned, and then was, in full force; and that upwards of thirty days before, and up to and until the making of the distress, there was due and owing upon the said last-mentioned annuity a large sum of money, to wit, &c. The plea in bar to the second avowry was similar to that which was pleaded to the first avowry.

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General demurrer to both pleas in bar. Joinder in demurrer.

Upon argument, the Court of *King's Bench* gave judgment for the plaintiff below; whereupon the defendant brought a writ of error, and assigned for errors:—*First*, that the plaintiff below had not averred in his pleas in bar, that *G. Fletcher* entered into and upon the premises in which &c.; and inasmuch as the said demise of the said premises, in which &c., to the said *G. Fletcher*, operated as a demise at common law, and as the said *G. Fletcher* had not, in pursuance of the said demise, entered into and upon the said premises in which &c., no estate whatsoever passed out of the said *G. Taylor* by the said demise to the said *G. Fletcher*; therefore the said *G. Taylor* had a sufficient estate in the premises, in which &c., to grant the said annuity and the power of distress to *W. Hodgson* in the manner and form mentioned in the cognizances of the defendant below. *Secondly*, that it did not appear from the pleas in bar, that the demise to *G. Fletcher* was followed by the entry of *G. Fletcher* into or upon the premises in which &c., or by any other act of the said *G. Fletcher*, so as to vest the term thereby granted in him. *Thirdly*, that the plaintiff below did not shew by his pleas in bar that he had any title to, or interest in, the said premises, in which &c., and therefore could not aver that the said *G. Taylor* had not a sufficient estate in the said premises, in which &c., to grant the annuity and the power of distress to *W. Hodgson*. *Fourthly*, that the plaintiff below, being privy in estate to the said *G. Taylor*, was estopped from denying the title of the said *G. Taylor* to grant the said annuity and power of distress to the said *W. Hodgson*. And, *fifthly*, that the plaintiff below did not by his pleas in bar sufficiently traverse, or confess and avoid, the cognizances of the defendant below.

*Erskine*, for the plaintiff in error.—The plaintiff in error contends, that he had, by virtue of the deed set out

in his avowry, a right to distrain on the premises, notwithstanding the prior demise, and the circumstances stated in the pleas in bar. He admits, that, if the defendant in error was in under *Fletcher*, he could have no right to distrain upon him who claimed by a paramount title; and it can hardly be denied by the defendant in error, that, if he held under the grantor, by demise subsequent to the avowant's title, the distress would be legal. The questions, therefore, are, whether, on the face of these pleadings, it can be collected under what title the property of the defendant in error was upon these premises; and if it cannot, whose duty it was to shew such title; and what is the effect of the silence of the record upon this subject.

The grantor had such an estate in him at the time of the grant to *W. Hodgson*, as would enable him to distrain against all the world except *Fletcher* and those claiming under him. The demise to *Fletcher* was prior to the annuity granted to *W. Hodgson*; but, inasmuch as no part of the estate which *Taylor* had in him was taken out of him before that annuity was granted, he had, at that time, full power to give this right to distrain, defeasible, if *Fletcher* chose to enter under the prior demise to him. Now, it is admitted upon the pleadings, that *G. Taylor* had an estate for life; and therefore, unless, on the face of the record, some portion of the estate appears to have been taken out of him before the grant to *Hodgson*, that grant is good. It is said, however, to be taken out of him by the demise to *Fletcher*. The demise to *Fletcher* is a demise at common law, and there are words by bargain and sale to create an use upon which the statute might attach. In what way, then, is this deed to be considered as operating? If at common law, then, as *Fletcher* never entered, no part of the estate is taken out of the grantor. Upon this subject there are several authorities, some of which proceed upon the intention of the parties, as shewn by the deed itself; others treat it as a matter of election by the grantee, if the

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intention be doubtful; and in others it is said, that, where there is no election by the grantee, the deed operates as at common law. The first thing to be looked at, therefore, is the intention of the parties; if that be doubtful, the grantee may have his election; but if he make no election, then the deed is to operate as at common law, and no election is given to the Court. In support of the first proposition, it is laid down in *Fox's case* (a):—"But, forasmuch as the intention of the parties is the creation of uses (b), if by any clause in the deed it appears that the intention of the parties was to pass it in possession by the common law, then there no use shall be raised." And in *Roach v. Wadham* (c), which was a question whether a deed should operate as a conveyance or an appointment, Lord *Ellenborough* said—"This is a conveyance with a double aspect, having words which indicate an intention to pass an interest and to limit an use, and to be taken either as a conveyance or appointment. We will look, therefore, to the deed, and see which is the predominant intention." Upon the second proposition, *viz.* that, if the intention be doubtful, the grantee has his election, *Heyward's case* (d), *Davrel v. Gunter* (e), and 2 *Roll. Abr.* 787, pl. 6, are express authorities. And that, if there be no election, the deed is to operate as at common law, appears from these cases and from *Saunders on Uses* (f), and *Gilbert on Uses* (g), and was admitted by Mr. *Preston*, *arguendo*, in *Wynne v. Griffiths* (h). What, then, is the intention expressed upon the face of this deed, which must take effect entirely as a demise at common law, or entirely by bargain and sale, and not for part by the common law, and for the other part by raising an use? Now, there is nothing in the deed to shew that it was intended to operate by the statute; but, on the contrary, it is manifest that it was to oper-

(a) 8 Co. 94 a.

(b) 2 Inst. 272.

(c) 6 East, 289.

(d) 2 Co. 35 a.

(e) Sir W. Jones, 206.

(f) Page 49.

(g) Page 230.

(h) 5 B. & C. 933; 8 D. & R. 470.

ate as at common law; because, after the demise to *Fletcher*, there is an enumeration of the trusts to which that demise is subject; and, amongst others, he has the power to bring actions, make distresses on the tenants, or make entries to levy the arrears of the annuity; and it would seem, that, till the annuity was in arrear, the right of possession was postponed; in which sense, also, it is taken by the plaintiff himself, who avers that the annuity was in arrear before and at the time the distress was taken. But if this be doubtful, no election has been made by the grantee that it should operate in one way or the other; but, on the contrary, the averment that the annuity was in arrear shews, that he did not elect that it should operate by the statute of uses; for, if he had chosen so to take it, he would have received the rents *instantly*, and thus have kept down the annuity. There being no election, the deed would operate as at common law, and the effect of the demise would be, that the lessee would take an immediate interest, but no estate before entry. The whole estate in possession and reversion would remain unsevered in the lessor, until entry by the lessee. Thus, *Littleton* (a) says—"Tenant for term of years is, where a man letteth lands or tenements to another, for term of certain years, after the number of years that is accorded between the lessor and lessee; and when the lessee entereth by force of the lease, then is he tenant for term of years." And in the commentary to this passage it is said—"And true it is, that to many purposes he is not tenant for years until he enter; as a release made to him is not good to him to increase his estate before entry, but he (the lessor) may release the rent reserved before entry, in respect of the privity" (b). The same is laid down in *Bac. Abr. "Leases,"* M. (c); and the reason is, because, until entry, there is no severance of the possession from the reversion. Upon entry, then, for the first time,

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(a) Sect. 58, p. 43. b.

(b) Co. Lit. 46. b.

(c) See *Williams v. Bosanquet*,  
3 B. Moore, 500; 1 B. & B. 238.

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there is a severance; and until severance, no portion of the estate is out of the lessor, who retains, till entry, all the estate which he had at the time of the lease.

There is nothing on this record to shew that the plaintiff was in under *Fletcher*. There is no averment of *Fletcher's* entry, or of attornment by the plaintiff to him. On the contrary, the averment of the annuity being in arrear, which would give *Fletcher* a right of entry, though the plaintiff was not his tenant, shews that he was not in under *Fletcher*; and the subsequent grant of distress to *W. Hodgson* assumes that *Fletcher* had never entered. In *Chatfield v. Parker* (a), to an action of trespass for mesne profits, the defendant pleaded a judgment in 1822 against *A.*, an *elegit* and inquisition finding that *A.* was seised for life of the premises, and that the Sheriff delivered the premises to the defendant: the plaintiff replied, that, in 1820, *A.*, by indenture, bargained and sold the premises to him, and that he entered and continued in possession until &c.: upon oyer of the deed it appeared, that *A.*, in 1819, conveyed the premises to *Dawes* for one hundred years, to secure an annuity, and, subject to that, conveyed them to the plaintiff: and Mr. Justice *Bayley* said—"It appears, therefore, by the lease set out on oyer, that these premises were charged with an annuity, and, for better securing the payment of that annuity, had been conveyed to *Dawes*; the demise to the plaintiff was subject to the right of *Dawes*; but *Dawes* was not bound to enter; and if he did not enter, the plaintiff had the right. It is averred in the replication, that the plaintiff entered and became possessed, and continued in possession until the trespass was committed. The replication shews that the plaintiff had a right to the land against every person but *Dawes*. The demise to the plaintiff was to commence the day preceding the date of the indenture; it must be presumed, therefore, that *Dawes* had not entered at that time."

(a) 8 B. & C. 543; 2 M. & R. 540.

But it may be said, that it does not appear that *Fletcher* had not entered. To this it may be answered, that it was the duty of the plaintiff to shew under what title he was in. Every thing must be taken most strongly against the party pleading it (a): matter in defeazance of a claim must be alleged by way of answer, and need not be denied by anticipation (b); and facts which are peculiarly within the knowledge of the plaintiff should come from him, and need not be stated by the defendant (c). It cannot be assumed that the things taken were there as the property of a stranger, as in the case of cattle straying, because the quality of the goods taken negatives such a supposition. Inasmuch, therefore, as the plaintiff has shewn no title under *Fletcher*, or that *Fletcher* is in possession, and as the deed operates as at common law, such being the intention of the parties, or, if the intention be doubtful, there being no election by the grantee, the defendant has made out his right to distrain, and the plaintiff has shewn no ground for a return of the goods. But even if the deed gave immediate possession by the statute of uses, and it was unnecessary to aver the entry of *Fletcher*, still, as the grantor might give a power of distress against himself, and there is nothing to shew that the grantor is not in possession, it was the duty of the plaintiff to have shewn what title he had, not under the grantor. This was expressly decided in the case of *Howell v. Bell* (d)—“In replevin, the defendant avowed for that *W. R.* was seised of the place where &c., in fee, and, being so seised, he granted a rent-charge out thereof to *W. W.* for life; that *W. W.* is dead, and that he the defendant was his executor, and distrained in the place for so much rent in arrear and due to his

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(a) 1 Saund. 259 b, n. 8; Com. Dig. Pleader, (C.) 22; Co. Lit. 303. b.

(b) Com. Dig. Pleader, (C.) 81.

(c) Com. Dig. Pleader, (C.) 21, 81; 2 Saund. 62 b; *Casseres v.*

*Bell*, 8 T. R. 167.

(d) Vin. Abr. “Distress,” (D. 2.) 9; 2 Salk. 136; S. C. nom.

*Hoole v. Bell*, 1 Ld. Raym 172;

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testator in his life-time; but did not aver that the place where &c., was then in the seisin of the grantor of this rent, or any other person who claimed by, from, or under him; and upon a demurrer to this avowry, *Holt*, C. J., held, that the executor might distrain either on the grantor, or any other person who comes in by or through him, and if the plaintiff is not liable to the distress, it is more material for him to shew it in his replication for his own defence."

Whatever may be the effect of the deed, the grantor had power to confer the right of distress against himself and those who might take under him by subsequent demise. "So, if a man makes a lease, and afterwards grants a rent-charge out of the land, the cattle of the lessee are not distrainable, for he claims paramount the charge. But where a stranger claims under the grantor, after the grant of a rent-charge, his cattle are liable to distress, as cattle of a lessee where the demise was after the grant." *Com. Dig. "Distress"* (B. 2). From this it is clear, that, though the goods of *Fletcher* might not be liable, yet the goods of a stranger, or of one who claimed under the grantor by demise subsequent (a) to the grant to *Fletcher*, would; and as the plaintiff has not shewn his title, and the facts were within his knowledge, it must be presumed that he took by subsequent demise from the grantor.

It may be said, that the plaintiff was a stranger, because it does not appear under what title he held. That protection is extended only to cattle escaping, and not *levant* and *couchant*, and, being within the knowledge of plaintiff, should have been averred in defeazance of the right. *Bac. Abr. "Replevin,"* (K), p. 80. Other goods, the property of a stranger, are distrainable, and do not come within the exception. "In all cases where the land is debtor, the cattle of a stranger are as well liable as those of the owner of the land. So, if a neighbour's cattle es-

(a) See *Vin. Abr. "Distress,"* (B. 2).

cape into land, out of which a rent-charge issues, and are *levant* and *couchant*, (there are good authorities though they be not *levant* and *couchant* (a)), they are distrainable for the rent-charge, and the owner shall not have them again, unless he pay the arrears." *Vin. Abr. "Distress,"* (I.) 53 (b). These, however, are cases respecting cattle, which are within the exception. As to other goods, provided they be on the premises, it is immaterial whether they be the goods of the tenant or of a stranger, they are equally liable to distress (c).

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It is said, however, that the defendant had no power to distrain growing crops. It is not contended that such a right is conferred upon the grantee of a rent-charge by the stat. 11 Geo. 2, c. 19; but, by the words of the indenture, which give the defendant the power of distress, his right to distrain is co-extensive with that of a lessor for rent reserved upon a lease for years. . But, independently of that, the defendant cannot now make the objection in this form of action; for, if it be true, that growing corn be not distrainable in this case, it is equally true, that replevin will not lie for such corn for the same reason. *Bac. Abr. "Replevin,"* (F), *F. N. B.* 68. The general rule appears to be, that replevin lies for all goods and chattels that are distrainable at common law. *Com. Dig. "Replevin,"* (A), *Co. Lit.* 145. b. The stat. 11 Geo. 2, c. 19, allows a landlord to distrain growing crops; but the only sections of that statute (d), which relate to replevin suits, do not in any way authorize the replevying of growing corn. It is said to be the practice, since 11 Geo. 2, to replevy growing corn, when taken as a distress; but there is no decided case to warrant such practice. The case of *Glover v. Coles* (e), is the only one in which the ques-

(a) *Co. Lit.* 47.

*Falkner*, 4 T. R. 565.

(b) See *Vin. Abr. "Distress,"*  
(O. 5), (O. 7).

(d) *Ss.* 22 & 23.

(e) 1 Bing. 6; 7 B. Moore, 251.

(c) *Per Buller, J., Gorton v.*

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tion has even incidentally arisen. It was not, however, necessary to the decision of that case, and the opinion of the Judges who adverted to it only goes to this:—that in cases to which the stat. 11 *Geo. 2*, applies, growing corn may be deemed a chattel. The plaintiff, therefore, cannot object, that the defendant ought not to have distrained growing crops, upon the ground that the stat. 11 *Geo. 2* does not apply to a rent-charge; for, if that be so, then, neither can he maintain replevin, as growing crops can only be deemed goods and chattels for the purposes of a replevin suit in those cases to which that statute applies; he should have brought an action of trespass. It may be said, that, as growing corn is a chattel that would go to the executor and not to the heir, and is liable to be taken under a *fi. fa.*, it is sufficiently a chattel for the purpose of a replevin suit. But this cannot be so, for, if it were, with equal reason might it be said, that fixtures which could be taken in execution as goods and chattels, could be the subject of a replevin suit (a); but it is settled, that replevin is not maintainable for such fixtures. *Niblett v. Smith* (b). And, referring to the authority of *Co. Lit.* 145. b., already cited, where Lord Coke says, “a replevin lies where cattle or goods are distrained and impounded;” he evidently means such goods as were capable of being impounded. Previously to stat. 2 *W. & M. c. 5*, all goods distrained ought to have been removed within a reasonable time. *Com. Dig.* “*Distress*,” (D.) 1. The 3rd sect. of the stat. 2 *W. & M. c. 5*, as well as the 8th sect. of the stat. 11 *Geo. 2*, c. 19, severally give landlords power to impound the distresses made by them for rent on the premises of the tenant; but, previously to the first of these statutes, inasmuch as the goods distrained must have been removed from the premises in order to be impounded, and replevin being only maintain-

(a) See judgment of *Abbott*, C. J., 4 B. & A. 207.

(b) 4 T. R. 504.

able for such goods as were capable of being impounded, growing corn, not being capable of being impounded, could not have been made the subject of a replevin suit.

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*Preston*, for the defendant in error.—It is perfectly clear that growing crops were not distrainable at common law. That right was first given to landlords by stat. 11 *Geo. 2*, c. 19; but that statute does not apply to rent-charges, and therefore the defendant is driven to the terms of the deed. That part of the deed consists of two branches: the first gives the power of distress, that is, such a distress as legally could be taken for a rent-charge: the second, feeling the difficulty of disposing of and dealing with a distress, confers the same powers of disposing of and dealing with the distress, as if the annuity were a rent reserved upon a lease for years. The grantor could not give a right of distress larger than the law warrants, and the law allows a distress of distrainable articles only. As against himself, the grantor might confer such an authority; but he could not do so even against an assignee or lessee, much less against a stranger.

It is singular, that this is the first time that the main point in this case has been brought before the Courts. It is admitted, that the grantor had a right to grant both annuities; and that, if he had granted any number of annuities without creating a term, each annuitant might distrain; and if the second grantee had distrained and entered into possession, the first might have distrained upon him. But the moment a term was created, that moment the grantor was disqualified from charging the possession with a rent-charge, with this qualification, *viz.* that if he is in possession, he has a right to charge that possession with a distress, because there is an estoppel between the parties. It operates upon the ground of estoppel, not of right.

It is conceded, that if this were a term perfected by entry or by pleading the statute of uses, it would be a complete

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bar to this distress; which proves that the defendant had no right to distrain on the plaintiff, unless he had shewn that the plaintiff was in that particular situation to be affected by estoppel, so that the grantee might take a distress upon him as being estopped by force of the deed.

It may be admitted, that the grantor or his assignee cannot resist a distress upon his goods; and the same consequence would follow if a stranger put his goods upon the land of the grantor, or his cattle trespassed and were *levant* and *couchant*, because the possession would be liable. But if that were the case here, it was the duty of the defendant to shew it. The interest here may be perfected by entry, and, when perfected, would relate to the date of the grant, from which time, after ejectment, the grantee may recover *mesne* profits against the tenant in possession. The grantee may perfect his title at any time by entry—and, finding the plaintiff in possession, might recover *mesne* profits against him; and can it be tolerated that the second annuitant should take a distress, and that the tenant should be liable to the first annuitant also?

*Ex concessis*, the plaintiff would succeed if the term were perfected; but it is said, that it is not shewn to be perfected. The plaintiff is not the grantee, neither is he his representative or assignee, and has therefore no right of election for the grantee; but if there be a term it is sufficient for his purpose, and he has shewn that such a term exists. It would be vain to set up a term, if he were not to treat it as an available term. Now, the term has every property of a bargain and sale—it is for years—it is for money—and there are the words of bargain and sale, which indeed are not necessary (a). Can it then be said that it is not treated by the plaintiff as a subsisting term? In ejectment, the deed would be good by the statute, without entry.

[*Bayley, B.*—That would signify an election to treat it as a bargain and sale under the statute.]

(a) *Heyward's case*, 2 Co. 35 b.

Let us then consider upon whom the *onus* of shewing whether the goods are liable to distress lies. The goods are taken; the plaintiff complains; the defendant sets up a deed, which is met by the plaintiff, who states that, previously, the grantor granted a term of years, which confers a right to bring an ejectment and maintain an action for mesne profits against the tenant, and is an answer to every distress by a subsequent grantee, except upon the grantor himself, who is estopped by the subsequent deed. If the defendant means to say, that the plaintiff came in under the grantee, he should shew it. By alleging that there was a prior term, the plaintiff afforded an opportunity for the defendant to shew that the plaintiff came in under the grantor. Every person who comes in under the grantor would be liable, but a stranger is not; because he is liable to him who has a better title.

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*Erskine* replied (a).

*Cur adv. vult.*

TINDAL, C.J., now delivered judgment.—This was an action of replevin for taking certain goods and certain standing crops of *Green* (the plaintiff below); in which action, *Miller* (the defendant below) made cognizance as bailiff of one *William Hodgson*; and in his first cognizance (which differs from the second only in deducing the title of *George Taylor* from the owner of the fee), states that the said *George Taylor*, being seised for life, by an indenture dated the 25th September, 1806, granted to the said *Hodgson* an annuity of 166*l.* 2*s.* out of the premises, in which &c., for the term of ninety-nine years, if *Taylor* should so long live, payable in the manner therein mentioned, which had become due from *Taylor*, and had continued so due for more than

(a) After the argument, the Court suggested that the plaintiff should apply to the Court below to amend his pleadings, upon pay-

ment of all costs. A rule *nisi* was obtained accordingly, which was discharged with costs.

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twenty-one days, and justifies the taking and detaining the goods as a distress for such arrears.

To this cognizance, the plaintiff below pleads in bar, that, before the making of the indenture stated in the cognizance, viz. on the 7th *May*, 1806, the said *George Taylor*, being seised for the term of his life, by another indenture, then made between himself of the first part, the persons therein mentioned of the second part, one *Jackson Walton* of the third part, and one *Fletcher* of the fourth part, in consideration of the sum of 3000*l.* to *Taylor* paid by *Jackson Walton*, granted to the said *Walton* an annuity of 413*l.* 12*s.* out of the said premises, in which &c., for ninety-nine years, if *Taylor* should so long live; and for the better securing of the said annuity, for the considerations in the said indenture mentioned, and of 10*s.* paid to *Taylor* by *Fletcher*, the said *Taylor* granted, bargained, sold, and demised to the said *Fletcher* the said premises, in which &c., for ninety-nine years, if the said *Taylor* should so long live, upon trust, that, as often as the said last-mentioned annuity of 413*l.* 12*s.*, or any quarterly payment thereof, should be in arrear by thirty days, *Fletcher* should, out of the rents and profits of the said premises, or by mortgage in case there should not be sufficient distresses, or by making entries, levy such arrears and damages. The plea in bar then proceeds to allege, that the said indenture and the term of ninety-nine years thereby granted, were in full force and effect; and that, upwards of thirty days before the making of the distress, there was due and owing, by virtue of the said indenture of the 7th of *May*, the sum of 2000*l.* for arrears of the said annuity.

A similar plea in bar was pleaded to the second cognizance.

To these pleas in bar there was a general demurrer and joinder; and, after argument, the Court of *King's Bench* gave judgment for the plaintiff below for his damages and costs.

Upon this judgment a writ of error has been brought; and, after argument and time taken to consider, the Court of error is of opinion that the judgment of the Court below ought to be reversed.

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The argument in this case has turned upon the legal operation and effect of the demise from *Taylor* to *Fletcher*, contained in the indenture of the 7th of *May*, 1806; for, if such demise created a legal estate in *Fletcher*, the grant of the annuity by *Taylor* to *Hodgson* by the subsequent deed of the 25th *September*, 1806, but during the continuance of *Fletcher's* interest, must be altogether inoperative in creating any charge upon the premises.

Now, in order to give an estate to *Fletcher*, it is contended by the plaintiff below that the grant must either be considered as a demise at common law, or as a bargain and sale made upon a consideration of money, and operating under the statute of uses; in either of which cases the estate vests in *Fletcher* the grantee. The first question, therefore, is, whether the grant can be considered as a lease at common law. The objection taken to it as a lease at common law is this: that it does not appear upon the pleadings that *Fletcher*, the lessee, or any person claiming under him, entered after the lease was granted; and that, unless there is an entry by the lessee, or some one claiming under him, no estate vests in him; and such we consider to be the effect of the authorities. It is laid down in 1 *Inst.* 46. b., that, "to many purposes, the lessee is not tenant until he enters, as a release made to him is not good to him to increase his estate before entry, neither can the grantor grant away the reversion, by name, of the reversion before entry." Now, both these consequences depend upon the assumption that the estate has not passed out of the lessor into the lessee before he has by his entry accepted such estate; for, if the estate had actually passed to and vested in him, there can be no reason why a release would not increase such estate; nor, again, why the rever-

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sion should not pass by that name. And in further support of this distinction, Lord *Coke* goes on to say, "but the lessee before entry hath an interest, *interesse termini*, grantable to another." Thus putting in contradistinction the interest and the estate of the lessee. And again, *Littleton*, s. 459, lays down the same doctrine more pointedly, "if the lessor release to the lessee all his right &c., before that the lessee had entered into the same land by force of the same lease, such release is void; for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease." See also *Bacon's Abridgment*, title "*Leases*," M., where the necessity of an entry by the lessee, in order that the estate may vest in him, is put upon the ground that it is an acceptance by him of the estate. Under these authorities, therefore, we think that, as the plaintiff neither alleges an entry by *Fletcher* under the lease, nor shews any privity between his possession and *Fletcher's* term, nor any thing equivalent to an entry, such as an acceptance of the estate by the execution of the lease, no estate passed to *Fletcher* under the lease of the 7th *May*; and consequently, that the estate remained in the lessor, and that the grant of the annuity and the power of distress to *Hodgson*, by the indenture of the 25th *September*, was a grant capable of taking effect.

But it is contended by the plaintiff below, that, if the grant of the 7th *May* cannot take effect as a lease at common law, at all events it is good to pass the estate to *Fletcher*, as a bargain and sale, under the operation of the statute of uses.

It is undoubtedly true, that, where a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and may take it in that way which shall be most for his advantage (a); and therefore, if a

(a) *Sheph. Touchst.* 83.

man for money demises, grants, bargains, and sells to *J. S.* his land for years, *J. S.* has his election to take it either by demise at the common law, or by bargain and sale (a). So that *Fletcher* in this case, or any person claiming under *Fletcher*, and in privity with him, might at any time elect to claim under the deed which way they would. But the plaintiff, who pleads this grant, is, so far as appears upon the record, a stranger to it, and therefore is not competent to elect for *Fletcher*, whether the grant to him shall operate the one way or the other. Nor, indeed, does the plaintiff shew that any election has been made by any one, that the deed shall be held to operate under the statute. It is not even stated, as was before observed, that *Fletcher* ever executed the deed so as to assent to take any estate under it. For any thing that appears to the contrary, he is as much a stranger to it as *Green*, the plaintiff. Under these circumstances, we consider that the Court cannot be called upon to exercise an election for the grantee at the request of a stranger, for the purpose of defeating a subsequent grant of an annuity for a valuable consideration. The grant, therefore, must be left to such operation as it will have as a lease at common law; which, we have already seen, will not be sufficient to create an estate in the lessee, for want of an entry; and we therefore think the term of years set up under that grant forms no answer to the cognizance under the subsequent annuity deed.

Although, however, the defendant below had this right to distrain for the arrears of his rent-charge, yet, upon the due construction of the power of distress contained in the deed, we think that it did not extend to the growing and standing crops which have been taken under it. At common law, as is well known, the distress taken for rent in arrear was not saleable, but could only be kept as a pledge for the rent. But, by the statute 2 *W. & M.*, goods and chat-

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tels distrained for rent due under a contract, may be kept and sold in the manner pointed out by this statute. It was not until the 11 *Geo. 2*, c. 19, that landlords had power to distrain corn, grain, or other produce growing on the land demised. The grantee of the rent-charge is empowered by the deed to detain, manage, sell, and dispose of the distresses in the same manner in all respects as distresses for rent reserved upon leases for years, and as if the said annuity was a rent reserved upon a lease for years. We think that these words are fully satisfied by holding them to grant the powers which were given to landlords under the statute of *W. & M.*, without extending them to the new subject of distress first granted by the statute of *Geo. 2*. A power like the present ought at all times to be construed strictly, and more especially when it is sought to bring within it the growing crops of a person who is a stranger to the deed. Upon the whole, therefore, we think the present judgment should be reversed, and that judgment should be entered for the person making cognizance for a return of the cattle, goods, and chattels, which were taken in distress, and for that part of the distress only; with a judgment for the plaintiff for damages for taking and detaining the growing crops.

Judgment accordingly.

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## ROUTLEDGE v. GILES.

**T**HE plaintiff obtained his verdict in the first sittings in *Trinity* Term. On the 9th *June*, judgment was signed; and, on the 10th or 11th, the defendant's goods were seized under a *fi. fa.* The judgment was for debt and costs, but the plaintiff's attorney did not deliver to the defendant's attorney a copy of the bill of costs, and affidavit of increase, or give one day's notice before the costs were taxed (a). The 11th *June* fell on a *Saturday*, and the 13th was the last day of term. On the 21st, a docket was struck against the defendant; on the 22nd, a commission issued; and, on the 24th, the defendant was adjudged a bankrupt. On the 5th *July*, the assignees were chosen; and, on the 6th, a summons was taken out to set aside the proceedings. The summons was attended on the 8th, and adjourned till the 12th, when it was further adjourned, with a stay of proceedings, until the 4th day of *Michaelmas* Term, when—

*Platt* obtained a rule to set aside the judgment and execution for irregularity, upon the ground that the plaintiff had not complied with the rule of Court.

*Erle* shewed cause.—The irregularity, if there be any, has been waived by the defendant's delay. It is a general rule, that a party comes too late to complain of an irregularity, who, by lying by, puts his opponent in a worse situation than he would have been in had the complaint been promptly made. If the complaint had been made promptly, the plaintiff might have waived his judgment, and re-taxed his costs before the bankruptcy.

An irregularity must be complained of at the earliest stage. Where, therefore, the plaintiff obtained a verdict in *Trinity* Term, upon which, on the 9th *June*, he signed judgment, without delivering a bill of costs; and, on the 10th or 11th, seized the defendant's goods in execution; and on the 21st a docket was struck; on the 22nd, a commission issued; and on the 24th, the defendant was adjudged a bankrupt; on the 5th *July* assignees were chosen; and, on 6th *July*, an application was made to set aside the proceedings:—*Held*, that the application was too late, and that, if there were an irregularity, it was waived.

(a) See R. M. T. 1 W. 4, *ante*, Vol. 1, p. 279.

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**Platt, contra.**—The plaintiff has not complied with the rule of Court, and the judgment is irregular.

[**Bayley, B.**—Has the effect of a non-compliance with the late rule come before the Court of *King's Bench* (a)?]

The imputation of delay is not warranted by the facts. The execution was put in on the 11th; before which time the defendant could have no notice that judgment had been signed. There was, therefore, but one day in term to make the application; and a Judge at Chambers could not set aside the proceedings, but merely stay them.

**Lord LYNDHURST, C. B.**—If you had applied early at Chambers, the plaintiff might have abandoned his execution and retaxed his costs in time to avoid the effect of the bankruptcy. You must come promptly to complain of an irregularity. In consequence of your delay, if this judgment were set aside, the plaintiff would sustain serious injury.

**BAYLEY, B.**—It is a settled rule, that you must come promptly to complain of an irregularity. If you had given notice when you first knew of the irregularity, the plaintiff would have been in a condition to avoid the consequences which would ensue if this rule were made absolute.

Rule discharged with costs.

(a) See *ante*, p. 93.

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SPICER and Another *v.* TODD.

**R. PINNING**, an insolvent debtor, being entitled to the rents and profits of an estate for life, his assignee tendered an indemnity to the plaintiffs, who were the trustees of the property, and brought an action against the tenant for rent in their name. Upon an affidavit that the action was brought against the consent of the plaintiffs, *Vaughan, B.*, at Chambers, set aside the proceedings for irregularity, with costs to be paid by the attorney. The order was not made a rule of Court.

The assignee of an insolvent debtor sued in the names of trustees for the insolvent, after having offered an indemnity to them, but without their consent. A Judge at Chambers set aside the proceedings; and the Court stayed the order and the proceedings until the trustees were indemnified.

*Archbold* obtained a rule *nisi* to rescind the order, contending, upon the authority of *Chambers v. Donaldson* (a), that the assignee might use the names of the plaintiffs; and that their only course was to apply to stay the proceedings until they were indemnified against the costs. He also urged that a Judge at Chambers had no authority to give costs; and that the rule, on that ground also, ought to be rescinded.

A Judge at Chambers has no power to give costs on summons.

*Platt*, who shewed cause, contended, that the motion could not be entertained, because the order was not made a rule of Court.

But the Court thought that the order might be rescinded, though not made a rule of Court, and directed *Platt* to proceed upon the merits (b).

He admitted that he could not support that part of the order which directed the payment of costs; but contended, upon the merits, that the assignee was not entitled to use the names of the plaintiffs without their consent, and expose them to the peril of costs.

(a) 9 East, 471.

(b) See *Hawes v. Johnson*, 1 Y. & J. 12.

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1831.

SPICER  
v.  
TODD.

*Archbold, contra.*—The learned Judge exceeded his jurisdiction by giving costs and setting aside the proceedings, which he could only stay, to give the plaintiffs an opportunity of applying to the Court (a). But, upon the merits, the order should be rescinded. In ejectment, it is the constant practice to use the names of persons in whom the legal estate is; and yet lessors of the plaintiff in ejectment are liable to costs. In *Chambers v. Donaldson* also, where an action was brought by a *feme covert* in the name of her husband, without his consent, the Court refused to interfere.

[Lord *Lyndhurst*, C. B.—The party could only obtain redress in that case for a trespass committed in her house, in which she lived separately from her husband, by using his name; and Lord *Ellenborough* said, that the defendants were colluding with the husband to protect their own wrong. But what right have you to commence this action without the approbation of the trustees? You should at least shew an application to them, and the offer of a sufficient indemnity before the action was commenced.]

The plaintiffs should apply to the Court to stay proceedings until they were sufficiently indemnified. If this rule be discharged, the assignee has no remedy but in equity.

The Court directed the order of *Vaughan*, B., and all proceedings in the action, to be stayed until the plaintiffs were indemnified to the satisfaction of the Master; and then the rule was to be—

Absolute.

(a) See Tidd, 511.

# REPORTS OF CASES

ARGUED AND DETERMINED

IN

## The Courts of Exchequer

AND

## Exchequer Chamber.

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HILARY TERM, 2 WILL. IV.

REGULÆ GENERALES.

1832.

I.

**WHEREAS** it is expedient that the practice of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer of Pleas*, should, as far as possible, be rendered uniform:—

**IT IS ORDERED**, That the practice to be observed in the said Courts, with respect to the matters hereinafter mentioned, shall be as follows; that is to say—

### AUTHORITY TO PROSECUTE OR DEFEND.

1. Warrants of attorney to prosecute or defend shall not be entered on distinct rolls, but on the top of the issue roll (a).

Appointments to sue and defend—to be entered on issue roll.

(a) It was formerly the practice in the *King's Bench* to enter the

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Special admission of *prochein amy* or guardian, to apply to one case only.

2. A special admission of *prochein amy* or guardian to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified (*b*).

#### AFFIDAVIT.

Affidavit of service of process not to be sworn before attorney or clerk.

3. No affidavit of the service of process shall be deemed sufficient if made before the plaintiff's own attorney, or his clerk (*c*).

Affidavit not intitled, if sworn before Judge, to be received in Court to which Judge belongs only.

4. An affidavit sworn before a Judge of any of the Courts of *King's Bench*, *Common Pleas*, or *Exchequer*, shall be received in the Court to which such Judge belongs, though not intitled of that Court; but not in any other Court, unless intitled of the Court in which it is to be used (*d*).

warrants of attorney on a particular roll kept for that purpose; 1 Salk. 88; but this was afterwards altered by R. E. 4 Jac. 2, K. B., from which time warrants of attorney in the *King's Bench* have been entered on the issue roll. In the *Common Pleas*, they are entered on distinct rolls. Tidd, 95. This practice is therefore assimilated to that of the *King's Bench*.

(*b*) In the *Common Pleas*, the admission was special, to prosecute or defend a particular action; or general, to prosecute and defend all actions whatsoever; 1 Str. 304; Tidd, 100; but it was said that, by the practice of the *King's Bench*, a special admission would be sufficient for all actions. 1 Str. 305. In this the practice of the *Common Pleas* has been adopted.

(*c*) It was the practice of the *Common Pleas* to allow an affidavit

of the service of process, with a view to enter an appearance for the defendant, to be sworn before the attorney in the cause. R. E. 13 Geo. 2, reg. 1, C. P. This rule is, therefore, in this respect, abrogated.

(*d*) In the *King's Bench*, it was not necessary that an affidavit should be intitled of the Court, 7 T. R. 457, provided it was sworn before a person having, and appearing upon the affidavit to have, authority to administer an oath in that Court, as before a Judge of the Court, 13 East, 189, or the filacer of the *King's Bench*. 1 Chitt. Rep. 165; 3 M. & S. 157. In the *Common Pleas*, 1 B. & P. 271, and *Exchequer*, 1 Mann. Prac. 83, affidavits not intitled of the Court could not be received. By stat. 1 W. 4, c. 70, s. 4, every Judge of the Courts may transact such bu-

5. The addition of every person making an affidavit shall be inserted therein (*e*).

Addition of deponent to be stated in affidavit.

6. Where an agent in town or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail (*f*).

Affidavits not to be sworn before agent, or attorney, or clerk, except affidavits of debt.

#### ARREST.

7. After *non pros*, nonsuit, or discontinuance, the defendant shall not be arrested a second time without the order of a Judge (*g*).

No second arrest after *non pros*, nonsuit, or discontinuance, without leave.

siness at chambers or elsewhere, depending in any of the Courts, as relates to matters over which the Courts have a common jurisdiction.

(*e*) This was the practice of the *King's Bench*, R. M. 15 Car. 2, reg. 1, K. B.; but, in the *Common Pleas*, it was not necessary that an affidavit by a defendant should state his addition, if his name and place of abode were stated. 6 Taunt. 73.

(*f*) It was the practice of all the Courts, that affidavits sworn before the attorney or solicitor in the cause, could not be read, except affidavits to hold to bail, and, as before mentioned, affidavits of service to found an appearance in the *Common Pleas*. But this rule did not apply to affidavits sworn before the attorney's clerk; 8 T. R. 638; Barnes, 45; nor, in the

*Common Pleas*, to affidavits sworn before the actual attorney, if not the attorney upon the record. 5 Taunt. 89; 3 B. Moore, 355. By this rule the real intention of the general practice will be effectuated; and, by the practice of the *Exchequer*, affidavits cannot be sworn before the partner of the attorney in the cause. 1 Price, 116. Affidavits of debt may still, as formerly, be sworn before the attorney. R. E. 15 Geo. 2, reg. 2, K. B.; R. E. 13 Geo. 2, reg. 1, C. P.

(*g*) Formerly, in the *King's Bench*, the plaintiff, after *non pros*. for want of a declaration, could not arrest the defendant for the same cause of action; 1 Ld. Ray. 679; but this was afterwards overruled, 1 Str. 439, because it was said the plaintiff suffered sufficiently by paying the costs of

**Affidavits for work and labour, and money paid, to state request of defendant.**

8. Affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request of the defendant (*h*).

**No supplemental affidavits.**

9. No supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail (*i*).

**Variance between *ac etiam* and declaration, or want of *ac etiam* not to relieve bail or discharge the defendant; but bail to stand for 40<sup>l</sup>.**

10. A variance between the *ac etiam*, and the declaration, or the want of an *ac etiam*, where the defendant is arrested, shall not be deemed ground for discharging the defendant, or the bail; but the bail bond or recognizance of bail shall be taken with a penalty or sum of £40 only (*k*).

the first action. In the *Common Pleas*, the defendant could not be held to bail a second time, after a *non pros*. 3 Moore, 607; 1 B. & B. 289; 4 Moore, 294. After nonsuit, the defendant might in all the Courts have been arrested a second time for the same cause; Barnes, 73; 1 Chit. Rep. 273; 3 Moore, 608; 1 B. & B. 289; unless the nonsuit proceeded upon the merits, or the second arrest was actually vexatious. Tidd, 175. So, after discontinuance in consequence of a mistake, 2 Wils. 381, the discontinuance being complete by the payment of costs, Str. 1209; Barnes, 399; 7 Moore, 312; 3 M. & S. 153, the defendant might have been arrested a second time; but where the first arrest was before the cause of action accrued, the *King's Bench* refused leave to discontinue; 5 M. & S. 93; and the *Common Pleas* always inferred the second arrest to be op-

pressive, unless the former suit was discontinued merely because it was misconceived. 3 Moore, 607; 1 B. & B. 289.

(*h*) This was, before this rule, a fatal defect in the *King's Bench*; 5 M. & S. 446; 3 M. & R. 129; 8 B. & C. 654; and *Exchequer*, 2 C. & J. 44; but it was otherwise in the *Common Pleas*. 5 Taunt. 704; 1 Marsh. 315; 5 Taunt. 756; 6 Taunt. 389; 2 Marsh. 83; 1 Bingham. 338; 8 Moore, 332.

(*i*) It was formerly the practice of the *Common Pleas*, to receive supplemental affidavits in certain cases where the affidavit of debt was defective; but it was the constant practice of the *King's Bench* not to receive a supplemental or explanatory affidavit. Tidd, 189.

(*k*) By the old practice in *King's Bench* and *Common Pleas*, the bail were discharged if the plaintiff declared against the defendant for a cause of action different from

## WRIT, WHEN AND HOW TO BE FILED.

11. When the rule to return a writ expires in vacation, the Sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open (*l*). Sheriff, when ruled, to return writ in vacation.

12. And the officer with whom it is filed shall indorse the day and hour when it was filed (*m*). Officer to indorse hour when filed.

## BAIL.

13. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime (*n*). Attorney and clerk not to be bail to action, except to render.

that expressed in the process; Tidd, 294; but, in the *Common Pleas*, the variance between the writ and count was no ground for discharging the bail, where the sum sworn to was under 40*l*. 1 H. Bl. 310. This rule is founded upon the practice of the *Common Pleas*, and the stat. 13 Car. 2, stat. 2, sect. 2, which directs, that no security exceeding 40*l*. shall be taken for a defendant arrested upon process, wherein the certainty and true cause of action is not particularly expressed. The stat. 13 Car. 2, stat. 2, sect. 2, does not apply to the *Exchequer*. Man. Pract. 63.

(*l*) The rule to return the writ expires, in all the Courts, in *four days* after service in *London* and

*Middlesex*, and in *six days* in any other city or county. In the *Common Pleas*, 5 Taunt. 647, and *Exchequer*, 9 Price, 255, the offices being always open, the Sheriff was bound to file the writ at the return; but, in the *King's Bench*, if the rule expired in vacation, the Sheriff had until the whole of the first day of the ensuing term to file his return. 5 East, 386.

(*m*) This is adopted from the *King's Bench*, where the *custos brevium* is required to indorse on every writ on what day and at what hour the same is filed. Tidd, 308; R. T. 30 Geo. 3, K. B.; 3 T. R. 787.

(*n*) It is a rule of all the Courts that an attorney, Reg. Gen. M. 1654; M. T. 1740; 2 Doug. 466;

Country bail piece to be transmitted within 8 days; if the defendant lives more than 40 miles from London, in 15 days.

Exception to bail, who are bail to Sheriff, after assignment of bond.

Two days' notice of justification sufficient in all cases.

Bail excepted to in vacation to justify in term, unless required by notice to jus-

14. In the case of country bail, the bail piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from London; and in that case, within fifteen days after the taking thereof (*o*).

15. When bail to the Sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail bond (*p*).

16. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification (*q*).

17. If bail, either to the action or in error, are excepted to in vacation, and the notice of exception require them to justify before a judge, the bail shall justify within four

Prac. Reg. 211; or attorney's clerk, Cowp. 828; 1 H. Bl. 76; 2 H. Bl. 349; 3 Price, 263; 1 B. & P. 356; whether articulated or not, 1 Taunt. 164, n., cannot be bail to the action; and the same rule applies, though the clerk is not in the service of the defendant's attorney. 2 B. & P. 564. By the practice of the *King's Bench*, however, bail could not formerly, upon this ground, be treated as a nullity. 2 East, 881; 1 Chit. Rep. 714; 8 Mod. 339. This rule extends only to practising attornies, (see 1 Chit. Rep. 714, note), and practising attornies may be bail for the purpose of rendering the defendant. 2 Bl. 1180; 1 Taunt. 164.

(*o*) See R. T. 8 W. 3, reg. 2, S. 3, K. B.; 5 W. & M. C. P.; Man. Ex. Pract. 106. This was

the practice in *King's Bench*; in the *Common Pleas*, and *Exchequer*, the defendant had ten or twenty days to transmit the bail piece, according to circumstances.

(*p*) When the bail below became bail above, no exception could be taken in the *King's Bench* after an assignment of the bail bond; 7 Mod. 62; but, in the *Common Pleas*, the same bail might be excepted to after an assignment of the bail bond. Barnes, 90; Id. 63; Ca. Pract. 61.

(*q*) By the practice of the *King's Bench*, 9 East, 434, R. E. 5 Geo. 2, K. B., and *Exchequer*, Man. Pract. 103, where an exception was entered in the vacation, notice of justification for the ensuing term must have been given within four days after such exception, or the plaintiff might take

days from the time of such notice, otherwise on the first day of the ensuing Term (*r*). tify at chambers.

18. Notice of more bail than two shall be deemed irregular, unless by order of the Court or a Judge (*s*). More than two bail irregular, without leave.

19. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth the amount required by the practice of the Courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail (*t*). Affidavits of justification must state that bail is worth sum required after payment of debts, and liability as bail in other actions.

20. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognisance (*u*). Bail rejected may render.

21. Bail shall only be liable to the sum sworn to by the Bail liable to sum sworn to,

an assignment of the bail bond; by the practice of the *Common Pleas*, notice of justification might be given any time in vacation, so that two days' notice was given before the first day of next Term. Barnes, 101. This rule seems to have been framed to meet this discrepancy in the practice, and does not alter the notice required by the practice of the different Courts where the bail are put in in term, viz. in the *King's Bench* one day, unless Sunday intervene, or the bail be added; and in the *Common Pleas* and *Exchequer* two days; the notice in each case to be served before 11 o'clock, A. M. Neither does this rule alter the notice of bail to be put in and justified at the same time. R. T. 1 W. 4, *ante*, Vol. 1, p. 469.

(*r*) This rule is founded upon

R. M. 1 W. 4, Exch., *ante*, Vol. 1, p. 281, with a qualification that the bail shall not justify at chambers in vacation, unless required by the notice of exception so to do

(*s*) Notice of more than two bail was, before this rule, irregular, in the *Common Pleas*, 2 Blac. 1122; but not in the *King's Bench* or *Exchequer*. 1 Chitty's Rep. 601; Forrest, 138; Lofft, 26.

(*t*) This was always necessary in the *Exchequer*, 1 Chit. Rep. 306; but not in the *King's Bench*, 1 Chit. Rep. 305; or *Common Pleas*. 7 Taunt. 324; 1 Moore, 29, *contr.* 3 B. & P. 39.

(*u*) In the *King's Bench*, rejected bail were capable of rendering, so long as their names remained on the bail piece; 5 T. R. 633; 1 Chit. Rep. 445; but, in the *Common Pleas*, rejected bail could not

and costs not exceeding amount of recognizance.

affidavit of debt, and the costs of suit; not exceeding in the whole the amount of their recognizance (v).

Render before prison doors closed.

22. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night (w).

No proceedings on bail bond pending body rule.

23. A plaintiff shall not be at liberty to proceed on the bail bond pending a rule to bring in the body of the defendant (x).

No proceedings on bail bond till four days, if in

24. No bail bond taken in *London* or *Middlesex* shall be put in suit, until after the expiration of four days; nor,

render their principal. 1 N. R. 137. One bail only cannot render. Barnes, 60.

(v) In the *King's Bench*, where the plaintiff declared for or recovered a greater sum than was expressed in the process upon which he declared, the bail were not discharged, but were liable for as much as was sworn to or indorsed on the process, or for any less sum which the plaintiff might recover, together with the costs of the action. In the *Common Pleas*, each of the bail was liable for the sum recovered, to the full extent of the penalty of the recognizance, being double the sum sworn to and indorsed on the writ. In the *Exchequer*, upon a recognizance of bail in any action brought in that Court, the bail therein were not jointly or severally liable in such action for more in the whole than the amount of the sum sworn to in the affidavit of the cause of ac-

tion, together with the costs of such action, unless any proceeding were had upon their recognizance, in which case they were liable also to such other costs as they were by law liable to. R. H. 38 Geo. 3, Scac.; 8 Price, 502. See Tidd, 280, 281.

(w) By the practice of the *King's Bench* and *Common Pleas*, the render must have been made before the rising of the Court on the last day for rendering; Tidd, 283; but, in the *Exchequer*, a render after the rising of the Court was good. 1 Price, 338.

(x) Before this rule, this was the practice of all the Courts. See 7 B. & C. 478; 1 M. & R. 298; 3 B. & P. 564; 7 Moore, 600; 1 Bingh. 181; R. M. 1 W. 4, Scac. ante, Vol. 1, p. 281. The plaintiff may, however, take an assignment of the bail bond before the time for justification has expired, but may not put it in suit.

if taken elsewhere, till after the expiration of eight days exclusive from the appearance day of the process (*y*).

London and Middlesex, or eight days if elsewhere, from appearance day of process.

25. The time allowed for excepting to bail put in upon a *habeas corpus* shall be twenty days (*x*).

Twenty days to except to bail on *habeas corpus*.

26. A recognizance of bail in error shall be taken in double the sum recovered, except in case of a penalty; and, in case of a penalty, in double the sum really due, and double the costs (*a*).

Bail in error, amount of recognizance.

27. In ejectment, the recognizance of bail in error shall be taken in double the yearly value, and double the costs (*b*).

Bail in ejectment, amount of recognizance.

#### BAIL BOND, AND ACTION THEREON.

28. An action may be brought upon a bail bond by the Sheriff himself in any Court (*c*).

Sheriff may sue on bail bond in any Court.

(*y*) This rule is founded upon the rule of the *Common Pleas*, T. 30 Geo. 3. In the *King's Bench* it has been holden, that, if the bail do not justify in four days after exception, the plaintiff is at liberty to proceed upon the bail bond, although, from the bail having been put in sooner than was necessary, the rule to return the writ has not expired. 4 B. & C. 864; 7 D. & R. 374.

(*z*) Formerly, twenty-eight days in the *King's Bench*, and twenty in the *Common Pleas*.

(*a*) In personal actions, it is a rule founded upon the stat. 3 Jac. 1, c. 8, that the recognizance shall be acknowledged in double the sum adjudged to be recovered by the former judgment. Tidd, 1155.

Upon error, in debt on a penalty in the *King's Bench*, it was sufficient if the bail justified in double what was really due; 2 Str. 821; in the *Common Pleas*, it was sufficient if the bail were bound in double the sum claimed by the creditor, 2 B. & P. 443; and in the *Exchequer*, each of the bail justified to the amount of the penalty. R. E. 33 Geo. 3, Scac.

(*b*) In the *King's Bench*, the bail was taken in double the improved rent and single costs, 8 East, 298; in the *Common Pleas*, in two years' rent and double costs, 7 Taunt. 428; 1 Moore, 119; and, in the *Exchequer*, in double the improved annual value or rent of the premises. R. E. 33 Geo. 3, Scac.

(*c*) Before this rule, the Sheriff

Where bail bond security, plaintiff may sign judgment on it.

29. In all cases where the bail bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it (*d*).

Proceedings on bail bond stayed on payment of costs in one action.

30. Proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more (*e*).

#### APPEARANCE.

Appearance to process by original, when entered.

31. A defendant who has been served with process by original shall enter an appearance within four days of the appearance day, if the action is brought in *London* or *Middlesex*, or within eight days of the appearance day in other cases, otherwise the plaintiff may enter an appearance for him according to the statute; and any attorney who undertakes to appear shall enter an appearance accordingly (*f*).

#### IRREGULARITY IN PROCESS AND PROCEEDINGS.

Misnomer.

32. Where the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail bond delivered up to be cancelled, on motion for that purpose, if it shall appear

could only bring an action in the *King's Bench* upon the bond taken upon process in that Court, 8 T. R. 152; but it was otherwise in the *Common Pleas*, 1 H. Bl. 631; and *Exchequer*, 8 Price, 174.

(*d*) If proceedings upon a bail bond be stayed upon the terms of the bail bond standing as a security, the bail bond will be like a *cognovit* by the bail, defeasible upon the payment of the debt and

costs, if any, by the original defendant. This is new in all the Courts.

(*e*) See 2 B. & A. 598; 1 Chit. Rep. 337. The plaintiff cannot sue two of three obligors on a bail bond jointly.

(*f*) This rule is founded upon the rule H. 6 Geo. 1, reg. 2, C. P., and alters the practice of the Court of *King's Bench*. See Tidd, 240.

to the Court that due diligence has been used to obtain knowledge of the proper name (*g*).

33. No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity (*h*). Irregularity,  
when to be  
complained of.

34. If a party plead several pleas, avowries, or cogni- Double pleading

(*g*) This is entirely a new rule upon a subject upon which there was no difference of practice in the Courts. Where a defendant has been arrested by the initials of his Christian name, or by a wrong name, or without a Christian name, he has uniformly of late been discharged out of custody, unless he has passed as well by one name as the other, or has obtained the credit, in respect of which the action is brought, in the name in which he is arrested. The two cases, 1 Price, 277, and 2 Price, 328, have probably been supposed to be at variance with the practice in the *King's Bench* and *Common Pleas*; but in one of those cases the process was a *subpoena*, not strictly speaking a bailable process; and, in the other, the name was *idem sonans*, although, certainly, it was not decided upon that ground. The defendant may, it is true, still plead the misnomer in abatement, and this will be his only remedy; for this rule will, in effect, put an end to summary applications to the Court, because the party arresting has the opportunity of

swearing last; and the use of due diligence is a matter of opinion, upon which no indictment could be framed for perjury. The Court will probably require the exertions made to be disclosed distinctly upon the affidavit.

(*h*) The *King's Bench* and *Exchequer* have always refused to set aside proceedings for irregularity, unless the application was made within a reasonable time; but the *Common Pleas* did not bind the party to any particular time, provided the application was made before a further step was taken in the cause. Tidd, 514, 515. Irregularity in the process must be taken advantage of before appearance; Tidd, 513; and if the irregularity be in the delivering, filing, or notice of declaration, the application should be made, if possible, two days at least before the time for executing the writ of inquiry. 2 Chit. Rep. 237; Barnes, 255; 2 New Rep. 75; 6 Price, 15. There is, however, a distinction between irregularity and a complete defect of the proceedings; the former may be waived, the latter cannot. Tidd, 515.

without rule, a nullity.

zances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment (s).

#### DECLARATION, AND TIME FOR.

Plaintiff may declare within a year.

35. A plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable (k).

Declaring against prisoner.

36. When the plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served and another filed, with an affidavit of service; upon the office copy of which affidavit a rule to plead may be given (l).

Rule to declare, on removal of causes.

37. Where a cause has been removed from an inferior Court, the rule to declare may be given within four days after the end of the Term in which the writ is returned (m).

(i) Before this rule, if several pleas were filed in the *King's Bench*, without a rule for that purpose, they were considered a nullity, and the plaintiff might sign judgment; Tidd, 658; but, in the *Common Pleas*, it was necessary to move to strike them out. 1 B. & P. 415. In certain cases, no rule is necessary. See R. T. 1 W. 4, ante, Vol. 1, p. 472.

(k) In the *King's Bench*, Tidd, 421; 3 B. & A. 272, and in the *Exchequer*, Dax's Pract. 50, the plaintiff might declare at any time within a year next after the return day of the process, unless judgment of *nonpross* had been previously signed, but not afterwards. In the *Common Pleas*, if the plaintiff were not ruled to declare, (see post, Rule 38), he had all the vacation of the second term, including

that in which the process was returnable, to declare; and if he did not declare in that time, or obtain a rule for time to declare, a declaration afterwards was irregular. 5 Taunt. 649; Tidd, 422.

(l) Before this rule, it was necessary, in the *King's Bench*, to make three copies of the declaration, one to be delivered to the defendant or left with the gaoler for him, another to be annexed to the affidavit of service and filed, and a third to be annexed to the office copy of the affidavit, to be produced to the Master before judgment; R. E. 5 W. & M. reg. 3, s. 2, K. B.; and the same practice prevailed in the *Exchequer*. Man. Pract. App. 207. But the third copy was not necessary in the *Common Pleas*. Tidd, 344, 345.

(m) The rule to declare might

88. It shall not be necessary for a defendant in any case to give a rule to declare, except upon removals from inferior Courts; but the plaintiff may have a rule for time to declare in the Court of *Exchequer* as well as in the other Courts (n).

No rule to declare in general; time to declare in *Exchequer*.

89. A rule to declare peremptorily may be absolute in the first instance (o).

Rule peremptorily to declare.

40. A declaration laying the venue in a different county from that mentioned in the process shall not be deemed a waiver of the bail (p).

Declaration varying from process in venue, not to discharge bail.

41. It shall not be deemed necessary to express the amount of damages in a notice of declaration (q).

Amount of damages need not be expressed in notice of declaration.

42. Where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether

No rule to plead after amend-

be given in the *King's Bench* within fourteen days; 11 East, 183; or, in the *Common Pleas*, within four days after the end of the Term, and served on any day before the time in the rule expired; and the plaintiff, in the *King's Bench*, was bound to declare within four days after such service. Tidd, 418.

(n) A rule to declare was not necessary in the *King's Bench*, but it was in the *Common Pleas* and *Exchequer* before *nonpros*. Such a rule is now unnecessary, because no *nonpros* can be signed without notice. R. T. 1 W. 4, ante, Vol. 1, p. 471.

(o) This is moved for where the plaintiff has obtained several rules

for time to declare, and binds the plaintiff to declare before the end of the Term in which such rule is made. In the *King's Bench*, it was absolute in the first instance; in the *Common Pleas*, a rule *nisi*. 1 H. Bl. 87; Tidd, 424. In the *Exchequer*, there was formerly no rule for time to declare.

(p) Formerly, the plaintiff lost his bail if he declared in any other county than that in which the *capias* issued. This was remedied by a rule, 22 Geo. 3, C. P.; 1 Moore, 515; but was still, before this late rule, the practice of the *King's Bench* by original. 3 Lev. 235; R. E. 2 Geo. 2, K. B.

(q) This was the practice of the *Common Pleas*. 6 Taunt. 331.

ment of declaration.

such amendment be made of the same term as the declaration, or of a different term (*r*).

#### PLEA, AND TIME FOR.

Plea may be demanded when declaration is delivered.

43. A demand of plea may be made at the time when the declaration is delivered, and may be indorsed thereon (*s*).

Insertion of instrument on oyer.

44. If a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer book may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer (*t*).

Pleading without imparlance, in certain cases.

45. If the declaration be filed or delivered so late that the defendant is not bound to plead until the next term, the defendant may plead as of the preceding term, within the first four days of the next term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea (*u*).

(*r*) Formerly, in the *Common Pleas*, a defendant was entitled to a new rule to plead in all cases on an amendment of the declaration; 2 Bla. Rep. 785; but this was altered by a late rule of Court, E. T. 1 W. 4. In the *King's Bench*, if the amendment was of the same Term, the defendant had two days to plead *de novo*; but if the amendment was in a subsequent Term, a new four-day rule was necessary. Tidd, 469.

(*s*) This was the practice of the *King's Bench*; 1 D. & R. 186; 5 East, 547; but, in the *Common Pleas*, demand of plea could only

be made *after* the declaration, and after the rule to plead; and a demand indorsed on the declaration, or made before the rule to plead, was irregular. 4 Taunt. 51.

(*t*) Such was formerly the practice of the *Common Pleas*; Barnes, 327; but the practice of the *King's Bench* was different; in which Court the defendant might either set forth the oyer in his plea or not at his election. 2 Str. 1241; 1 Wils. 97.

(*u*) As to when the defendant is bound to plead as of the Term in which the declaration is delivered, see R. T. 1 W. 4, *ante*, Vol. 1,

46. The defendant shall not be at liberty to waive his plea without leave of the Court or a Judge (v). No waiver of plea without leave.

## PARTICULARS.

47. A summons for particulars and order thereon may be obtained by a defendant before appearance, and may be made, if the Judge think fit, without the production of any affidavit (w). Particulars before appearance, and without affidavit.

48. A defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the Judge (x). Pleading after particulars delivered.

## NOTICES AND RULES, AND SERVICE THEREOF.

49. Where the residence of a defendant is unknown, no- Notice of declar-

p. 471, and post, Div. III. of these Rules. This dispenses with the necessity for a special imparlance in the *Common Pleas*; Tidd, 639; and now a Judge's order in the *King's Bench*, or Treasury rule in the *Common Pleas*, will not be necessary where a tender is pleaded after an imparlance. Tidd, 463.

(v) In the *Common Pleas* and *Exchequer*, the defendant could not waive his plea; Chitty's Pract. 136; but, in the *King's Bench*, it was necessary to rule the defendant to abide by his plea, which occasioned delay and expense, and afforded an opportunity to plead sham pleas. This, therefore, is a most salutary alteration.

(w) By the practice of the *King's Bench*, and latterly in the *Common Pleas*, R. T. 2 Geo. 4, C. P.; 6 Moore, 211, particulars could be obtained before appearance, in order that the defendant might settle the action without expense. In the *Exchequer*, it was necessary to have an affidavit that the defendant had never had the particulars, or had mislaid them, or was not sufficiently acquainted with the demand, so as safely to proceed to trial. Dax's Pract. 59.

(x) This was the practice of the *Common Pleas*, though the time for pleading had expired; and in the *King's Bench*, the defendant had the same time to plead after the particulars were delivered, as

ation where defendant's residence is unknown.

tice of declaration may be stuck up in the office, but not without previous leave of the Court (*y*).

When rules, orders, and notices must be served.

50. Service of rules and orders, and notices, if made before nine at night, shall be deemed good, but not if made after that hour (*x*).

Original rule need not be shewn, except to found attachment.

51. It shall not be necessary to the regular service of a rule, that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment (*a*).

Term's notice of trial, &c., may be given before first day of term.

52. Where a term's notice of trial or inquiry is required, such notice may be given at any time before the first day of term (*b*).

Rule to reply may be given at any time when office open.

53. A rule to reply may be given at any time when the office is open (*c*).

he had when the summons was returnable. Tidd, 469, 598.

(*y*) As to the mode of serving the notice of declaration in the different Courts, see Tidd, 457.

(*x*) Formerly, services before ten o'clock at night were good in the *King's Bench*, R. M. 41 Geo. 3, K. B., but not later. 1 East, 132. In the *Common Pleas*, R. E. 10 Geo. 2, C. P.; and in the *Exchequer*, see R. M. 1 W. 4, ante, Vol. 1, p. 278, they must have been served before nine o'clock at night.

(*a*) The service of a rule in the *Common Pleas* was not formerly good, unless the original rule was shewn in all cases. Barnes; 403; Tidd, 500. It may be useful to observe, that rules in the *Exchequer* do not operate as a stay of proceedings, unless two days' no-

tice of the motion be previously given. 9 Price, 14; Dax's Pract. 137; Price's Pract. 288. This salutary rule, which might usefully be imported into the practice of the other Courts, seems to have escaped the attention of the learned Judges who framed the new rules. See note Chit. Pract. 96.

(*b*) As to where a term's notice is requisite, see Tidd, 756, the notice must formerly have been given before the *essoign* day.

(*c*) The rule to reply might formerly have been given at any time in term, or within sixteen days afterwards, in the *King's Bench* and *Exchequer*; Tidd, 676; R. H. 16 Geo. 3, Scac.; and the practice of the *Common Pleas* was the same, except, after *Easter Term*, it must have been given within ten days

54. Service of a rule to reply or plead any subsequent pleading, shall be deemed a sufficient demand of a replication or such other subsequent pleading (*d*).

Rule to reply, &c., a sufficient demand of replication, &c.

#### PAYMENT OF MONEY INTO COURT.

55. In all cases in which money may be paid into Court, leave to pay it in may be obtained by a side bar rule (*e*).

To pay money into Court is a side bar rule.

56. On payment of money into Court, the defendant shall undertake by the rule to pay the costs, and, in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages (*f*).

On paying money into Court, the defendant must undertake to pay costs.

#### TRIAL, AND NOTICE THEREOF.

57. Notice of trial and inquiry, and of continuance of inquiry, shall be given in town, but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court, or a Judge (*g*).

Notice of trial and inquiry, where given.

from the end of the Term. Imp. C. P. 295; Tidd, 676. Now, the rule may be given at any time when the office is open.

(*d*) In the *King's Bench* and *Exchequer*, the rule to reply, &c., was deemed a demand, and no distinct demand was requisite. In the *Common Pleas*, a demand was necessary.

(*e*) This was a motion of course under the hand of counsel; but, if under 54, in the *Common Pleas*, it was a side bar rule. This principle is extended to all cases. As to when paid in, see Tidd, 622; Chitty's Pract. 117.

(*f*) See the different decisions of the Courts, Tidd, 622, 623.

The undertaking will be to pay the costs incurred up to the time of paying the money into Court. If the plaintiff proceed afterwards for a greater sum and fail, he loses the costs, but he may take the money out of Court, with costs up to the time of paying it in, after notice of trial and countermand, 8 T. R. 408, or even after a peremptory undertaking given and default; 1 Y. & Jerv. 213; but after judgment as in case of a nonsuit, 2 M. & S. 335, or *nonpros*, 6 Taunt. 158; 1 Marsh, 510; or the withdrawal of a juror, he is not entitled to any costs.

(*g*) In the *Common Pleas*, it might have been given to the agent

Short notice of trial is four days.

58. The expression "Short Notice of Trial" shall, in country causes, be taken to mean four days (*h*).

Notice of trial, at what stage of proceedings given.

59. In all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication, or other subsequent pleading, and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer (*i*).

in town or the attorney in the country. Barnes, 306; and see Tidd, 753, 757, 758.

(*h*) One exclusive and the other inclusive, *post*, Div. VIII. p. 201; Tidd, 756. In town causes two days seem to be sufficient, but it is usual to give as much more as the time will admit of. Tidd, 757.

(*i*) See R. T. 2 Geo. 1, C. P.; R. T. 26 & 27 Geo. 2, s. 4, Scac.; Tidd, 754; and R. H. 8 Geo. 1, K. B.; R. H. 6 Geo. 1, reg. 1, C. P.; R. T. 10 Geo. 1, C. P.; R. T. 26 & 27 Geo. 2, s. 4, Scac.; which are the foundation of the present

rule. If the *venue* be laid in *London* or *Middlesex*, and the defendant, or one of several defendants, 4 T. R. 520, lives within forty computed miles of *London*, eight days' notice of trial must be given in all the Courts; if all the defendants live above forty computed miles from *London*, then fourteen days' notice must be given. If the trial is to be in *London* at the *adjournment day*, the notice must so express it, and eight days' notice must be given before the first sitting day after term if the defendant resides above forty miles from *London*,

60. Notice of a trial at bar shall be given to the proper officer of the Court, before giving notice of trial to the party (s). Notice of trial at bar.

61. In country causes, or where the defendant resides more than forty miles from town, a countermand of notice of trial shall be given six days before the time mentioned in the notice for trial, unless short notice of trial has been given (j). Notice of countermand in country causes.

62. In town causes, where the defendant lives within forty miles of town, two days' notice of countermand shall be deemed sufficient (k). Notice of countermand in town causes.

63. The rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without affidavit or motion for that purpose (l). View, how obtained.

#### NEW TRIAL, MOTION IN ARREST OF JUDGMENT, &c.

64. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be Costs of new trials.

and four days if within that distance. R. E. 51 Geo. 3, K. B.; 13 East, 593; Imp. C. P. 368; R. H. 1 W. 4, Scac. Where the *venue* is laid in any other county, ten days' notice must be given in all the Courts. The notice of executing a writ of inquiry is eight days where the *venue* is in *London* or *Middlesex*, and the defendant lives within forty computed miles of *London*, and eight days where the *venue* is laid in any other county; but where the defendant resides above forty computed miles

from *London*, and the *venue* is in *London* or *Middlesex*, there must be fourteen days' notice.

(i) See Tidd, 750; 1 W. 4, c. 70, s. 7.

(j) This is in compliance with the stat. 14 G. 2, c. 17, s. 5; the qualification is founded upon R. H. 16 G. 3, Scac.

(k) See Tidd, 757.

(l) This was a motion of course in the *King's Bench*; but in the *Common Pleas* an affidavit was required, and the application was made in Court. Tidd, 797.

allowed to the successful party, though he succeed on the second (*m*).

Arrest of judgment, when moved.

65. No motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the Jury process be returnable in the same term (*n*).

#### JUDGMENT, AND TIME FOR SIGNING.

Judgment when signed for want of a plea.

66. Judgment for want of a plea after demand, may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before (*o*).

Judgment when signed after inquiry or verdict.

67. After the return of a writ of inquiry judgment may be signed at the expiration of four days from such return, and, after a verdict or nonsuit, on the day after the appearance day of the return of the *distringas* or *habeas corpora*, without any rule for judgment (*p*).

(*m*) This was the practice of the *King's Bench*, but the practice of the *Common Pleas* and *Exchequer* was different. Tidd, 916, 917; 1 Crompt. & Jerv. 54. Where costs are to abide the event, it does not mean the actual event, but the legal event, in all the Courts. Tidd, 915, 916; 2 Crompt. & Jerv. 128.

(*n*) This accords with the former practice of the *Common Pleas* and *Exchequer*. In the *King's Bench*, these motions might be made at any time before judgment was given. Tidd, 928, 929.

(*o*) This rule applies only where

the time for pleading has expired. In the *King's Bench*, the defendant had twenty-four hours to plead after the demand, exclusive of Sunday; in the *Common Pleas*, he had only until the opening of the office in the afternoon of the following day. Tidd, 477.

(*p*) By the stat. 1 W. 4, c. 7, a summary mode of obtaining execution upon writs of inquiry and verdicts is conferred. See Chitty's Pract. 124, 182. This rule was framed to assimilate the practice of the *King's Bench* to that of the *Common Pleas* and *Exchequer*, in

## JUDGMENT AS IN CASE OF A NONSUIT.

68. A rule *nisi* for judgment as in case of a nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings (*q*). No notice before judgment as in case of nonsuit.

69. No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately, *i. e.* without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of: or the Court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial; but the payment of such costs shall not be made a condition of discharging the rule (*r*). Judgment as in case of a nonsuit, when to be moved for.

70. No entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso (*s*). No entry of issue necessary before judgment as in case of a nonsuit.

which latter Courts it was not the practice to give a rule for judgment, but the prevailing party waited till after the appearance day, or *quarto die post* of the return of the *habeas*, before he signed final judgment, unless the *habeas* was returnable on the last general return day, in which case he signed judgment on the evening of the last day of term.

(*q*) In the *King's Bench*, the rule to shew cause was holden to be sufficient notice; but, in the *Common Pleas* and *Exchequer*, notice of the motion must have been previously given. Tidd, 765.

(*r*) This was the practice of the Court of *Common Pleas*, which dif-

fered from that of the *King's Bench* and *Exchequer*; for, in the latter Courts, the defendant might move for costs of the day, and afterwards for judgment as in case of a nonsuit. Tidd, 759, 760. In a town cause, the defendant cannot move for judgment as in case of a nonsuit, where no notice of trial is given, until the second term after issue is joined; and in a country cause, where issue is joined in an issuable term, and no notice of trial given, until the term after the second assizes.

(*s*) By the course and practice of the Courts of *King's Bench* and *Common Pleas*, the defendant could not move for judgment as in case

No trial by proviso in the same term as default.

71. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary (*t*).

#### WARRANT OF ATTORNEY AND COGNOVIT.

Attorney to be present when warrant of attorney or *cognovit* is executed by prisoner.

72. No warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff or other officer upon *meane process*, shall be of any force unless there be present some attorney on behalf of such person in custody expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney (*v*).

Entering up judgment on old warrant of attorney.

73. Leave to enter up judgment on a warrant of attorney above one and under ten years old, must be obtained by a motion in term, or by order of a Judge in vacation; and if ten years old or more, upon a rule to shew cause (*w*).

of a nonsuit, until the plaintiff was ruled to enter the issue. Chitty's Pract. 163. But, in the *Exchequer*, there was no rule to enter the issue. *Coltsworth v. Martin*, 2 C. & J. 123.

(*t*) See Tidd, 760, 761. In the *King's Bench*, a rule was necessary; in the *Common Pleas*, it was not. Tidd, 761.

(*v*) This was the rule of the *King's Bench*, R. E. 15 Car. 2, reg. 2; R. E. 4 Geo. 2; and *Common Pleas*, R. H. 14 & 15 Car. 2, reg. 4; and the practice of the *Exchequer*, see Tidd, 548. These rules,

however, applied only to warrants of attorney given by a defendant in custody upon *meane process*. Tidd, 550. A *cognovit* executed under similar circumstances was, in the *Common Pleas*, holden to be void; but, in the *King's Bench*, Tidd, 550, and *Exchequer*, 2 C. & J. 86, the rule was different.

(*w*) In the *King's Bench* the rule was absolute in the first instance, unless the warrant of attorney was above twenty years old, and then it was a rule *nisi*. 1 Chit. Rep. 618, n.; 2 B. & C. 555; 4 D. & R. 5. In the *Common Pleas*,

## COSTS.

74. No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs (*x*). Costs of counts and issues against plaintiff.

## EXECUTION.

75. It shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment paper, *postea*, or inquisition, has been seen by the proper officer (*y*). Writs of execution need not be signed—sealing.

76. A writ of *habere facias possessionem* may be sued out without lodging a *præcipe* with the officer of the Court (*z*). Hab. fac. poss. without præcipe.

77. In actions commenced by bill, a *ca. sa.* to fix bail shall have eight days between the *teste* and return; and in ac- Ca. sa. to fix bail.

if the warrant of attorney was above one and under ten years old, it was a side bar rule; if above ten and under twenty, a rule absolute; if above twenty, a rule nisi. Barnes, 47.

(*x*) See Tidd, 972, 973, 974, 975. This rule adopts the practice of the *Exchequer*, by which, where there were several issues, some found for the plaintiff and some for the defendant, each party was allowed the costs on the issues found in his favour. 2 Price, 272.

(*y*) In the *Common Pleas*, all executions were required to be signed by the Prothonotary before

they were sealed. R. E. 12 Jac 1, s. 3, C. P.; R. M. 1654, C. P.; But, in the *King's Bench*, a *fi. fa.* needed only to be sealed; and by rule of that Court, 2 & 3 G. 4, K. B.; 5 B. & A. 560; 1 D. & R. 471, the sealer of writs was not to seal any *fi. fa.* or *ca. sa.* without having the judgment paper, *postea*, or inquisition, produced to him; and the attorney for the plaintiff was required to indorse upon the writ the place of abode and addition of the defendant.

(*z*) In the *King's Bench*, a *præcipe* was required; but not in the *Common Pleas*. Tidd, 1244.

tions commenced by original, fifteen; and must, in *London* and *Middlesex*, be entered four clear days in the public book at the Sheriff's office (a).

## SCIRE FACIAS.

*Scire facias* not to be quashed after appearance without costs.

78. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a defendant has appeared, except on payment of costs (b).

*Scire facias* to revive judgment, how obtained.

79. A *scire facias* to revive a judgment more than ten years old shall not be allowed without a motion for that purpose in term, or a Judge's order in vacation; nor, if more than fifteen, without a rule to shew cause (c).

*Scire facias* on recognizance,

80. A *scire facias* upon a recognizance taken in Ser-

(a) The time between the *teste* and return was the same formerly as under this rule. In the *King's Bench*, the *ca. sz.* must have been entered, in *London* and *Middlesex*, four days in the public book; 5 M. & S. 323; 2 Chit. Rep. 102; but this was not the practice in the *Exchequer*; 1 M'Cl. & Y. 483; and, in the *Common Pleas*, it was necessary that the writ should lie in the sheriff's office four days. Barnes, 64. The days are exclusive.

(b) In the *King's Bench*, the defendant must have paid costs on quashing his writ of *scire facias* after the defendant had appeared, 1 B. & A. 486; but, in the *Common Pleas*, he might quash it without costs at any time before the defendant pleaded. Barnes, 431; Tidd, 1123.

(c) If the judgment is under seven years old, the *scire facias* is-

sues of course upon a *præcipe* without rule or motion; if above seven, and under ten, a side bar or Treasury rule is obtained. Formerly, if the judgment had been above ten years old, there must have been a motion to the Court in the *King's Bench*, supported by affidavit of the debt being due, the judgment unsatisfied, and the defendant living; upon which the rule was absolute in the first instance, unless the judgment were of more than twenty years' standing, and then there must have been a rule to shew cause; but latterly, if the judgment were above ten, and under fifteen, it was a rule absolute, on counsel's signature; if above fifteen, a rule to shew cause. In the *Common Pleas*, it was a rule *nisi* where the judgment was more than ten years old. Tidd, 1105.

jeants' Inn, or before a commissioner in the country, and recorded at *Westminster*, shall be brought in *Middlesex* only; and the form of the recognizance shall not express where it was taken (*d*). where to be brought.

81. No judgment shall be signed for non-appearance to a *scire facias* without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one *scire facias* (*e*). Judgment in *sci. fa.* for non-appearance.

82. A notice in writing to the plaintiff, his attorney, or agent, shall be a sufficient appearance by the bail or defendant on a *scire facias* (*f*). Appearance to *sci. fa.* by bail.

#### ERROR.

83. A writ of error shall be deemed a *supersedeas* from the time of the allowance (*g*). Writ of error *supersedeas* from allowance.

(*d*) This rule was framed to obviate the difficulty arising upon recognizances in the *Common Pleas*, which were obligatory by the caption. See Tidd, 1122.

(*e*) See Tidd, 1126; Chitty's Pract. 208.

(*f*) This was the practice in the *King's Bench* if the action were by bill; but, if by original, the appearance was entered in the *King's Bench* with the filacer; and, in the *Common Pleas*, on a *præcipe*, with the Prothonotaries. Tidd, 1127.

(*g*) By the stat. 1 W. 4, c. 70, s. 8, writs of error upon any judgment in the *King's Bench*, *Common Pleas*, or *Exchequer*, are returnable only in the *Exchequer*

*Chamber*; and, therefore, all writs of error, except writs of error *coram nobis*, in the *King's Bench*, or *coram vobis* in the *Common Pleas*, for error in fact or in process, which seem not to be affected by this act, Tidd's Supplement, 182, must be returnable in the *Exchequer Chamber*. A writ of error may be sued out before final judgment, and continues in force during the whole of the term in which it is returnable; and if final judgment be signed at any time afterwards during that term or vacation, it is a *supersedeas* from the time of signing it, if bail be put in within four days after final judgment is signed. In the *Exchequer*, a writ of error was only a

When bail may stay proceedings pending writ of error.

84. To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out (*h*).

#### SUPERSEDEAS.

Within what time proceedings are to be taken against prisoner.

85. The plaintiff shall proceed to trial, or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment; of which the term in or after which the trial was had shall be reckoned one (*i*).

List of superse-  
deable prisoners  
to be presented  
to Judges.

86. The Marshal of the *King's Bench* prison, and the Warden of the *Fleet*, shall present to the Judges of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer*, in their respective Chambers at *Westminster*, within the first four days of every term, a list of all such prisoners as are super-

*supersedeas* from the time of giving notice of the allowance. 4 Price, 289.

(*h*) The *King's Bench*, without regard to the time when the application was made, used to stay proceedings against the bail where a writ of error was allowed before the expiration of the time allowed to render, until the writ of error was determined, the bail undertaking to pay the condemnation money, or render the principal within four days after the writ of error was determined. But the *Common Pleas* would not grant time to render, but merely to pay the money, if the application was made after the time for rendering their principal had expired. Tidd, 532; 2 Price, 296; Forrest, 25;

Wightw. 79.

(*i*) The plaintiff must declare against a prisoner before the end of the next term after the writ or process by which the prisoner was taken or charged in custody is returnable. Tidd, 343. This rule conforms with the former practice of the *King's Bench*. Tidd, 360. In the *Common Pleas* and *Exchequer*, the plaintiff was bound to proceed to judgment within three terms after declaration, and to charge the defendant in execution within two terms after such judgment. Tidd, 361, 362. In the latter Courts, no notice was taken of the trial; but the plaintiff was bound to proceed to final judgment within three terms inclusive after the declaration.

sedcable; shewing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable (*j*).

87. If, by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any person detained in the actual custody of the Marshal of the *King's Bench* prison or Warden of the *Fleet*, be not entitled to a *supersedeas* or discharge, to which such prisoner would, according to the general rules and practice of the Court, be otherwise entitled for want of declaring, proceeding to trial or judgment, or charging in execution, within the times prescribed by such general rules and practice, then, and in every such case, the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the Marshal or Warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the Marshal or Warden shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the Judges of the respective Courts from time to time a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable (*k*).

Cause of detain-  
er to be stated  
to marshal or  
warden, and to  
be entered.

88. All prisoners who have been or shall be in the custody of the Marshal or Warden for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the *King's Bench*

Prisoners, one  
month after  
they are super-  
sedeable, to be  
discharged.

(*j*) This salutary rule of practice prevailed formerly in the *King's Bench*, but not in the other Courts. Tidd, 367.

(*k*) This was also a rule peculiar to the *King's Bench*. R. H. 57 G. 3, K. B.; 5 M. & S. 522

or *Fleet* prison as to all such actions in which they have been or shall be supersedeable (*l*).

Order to discharge supersedeable prisoner.

89. The order of a Judge for the discharge of a prisoner on the ground of a plaintiff's neglect to declare, or proceed to trial or final judgment or execution in due time, may be obtained at the return of one summons served two days before it is returnable; such order in town causes being absolute, and, in country causes, unless cause shall be shewn within four days, or within such further time as the Judge shall direct (*m*).

Order where prisoner in execution under 20*l*.

90. A rule or order for the discharge of a debtor who has been detained in execution a year for a debt under 20*l*. may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires (*n*).

#### ATTORNEY, AND HIS BILL.

One summons to tax attorney's bill.

91. An order to deliver or tax an attorney's bill may be made at the return of one summons, the same having been served two days before it is returnable (*o*).

(*l*) By former rules of the *King's Bench* and *Common Pleas*, prisoners in custody for *six* months after they were supersedeable, although not superseded, were to be forthwith discharged out of custody. R. T. 19 G. 3, K. B.; R. H. 6 & 7 G. 4, C. P.

(*m*) For the materials necessary to obtain such discharge, see Tidd, 368. One summons was sufficient in the *King's Bench* if the application was for not declaring; but, in the *Common Pleas*, if the summons was not attended, the order was an order *nisi*, unless

cause was shewn in six days; and, if the application was for not proceeding to judgment and execution in due time, three summonses were necessary if not attended. In a country cause, it was in all cases an order *nisi*, if not attended, unless cause was shewn in a limited time.

(*n*) This was formerly a rule *nisi* in the *Common Pleas*, 7 Taunt. 37, 467; in the *King's Bench*, it was absolute in the first instance. 2 B. & C. 804; 4 D. & R. 361.

(*o*) Formerly, there must have been three summonses in the *Com-*

92. One appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill (*p*). One appointment to tax costs.

93. No set off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted (*q*). No set off in prejudice of attorney's lien.

#### MISCELLANEOUS.

94. It shall not be necessary that a *pluries capias* be stamped by the clerk of the warrants, to authorize the exigenter to make out an *exigent* (*r*). *Pluries capias* need not be stamped for exigent.

95. In order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record (*s*). Proceedings need not be entered on record, to charge defendant in execution.

*mon Pleas* for this purpose; in the *King's Bench*, one was sufficient. Tidd, 335.

(*p*) Formerly, there must have been three appointments for this purpose, in the *Common Pleas*; in the *King's Bench*, one was sufficient; and the attorney was bound to attend upon the first appointment, without waiting for a second; and, if he did not attend, the Master might proceed *ex parte* in his absence. R. H. 32 G. 3, K. B.; 4 T. R. 580.

(*q*) In the *Common Pleas*, the attorney's lien for his costs was holden to be subject to the equitable claim that existed between the parties in the cause; 4 Taunt. 632; 1 D. & R. 168; but, in the *King's Bench*, the attorney's lien

must, in general, have been discharged, before the costs could be set off. Tidd, 339. In the *Exchequer*, there was no fixed practice upon the subject.

(*r*) This alters the rule. H. 2 & 3 Jac. 2, C. P.

(*s*) To charge a prisoner in execution it was necessary, in the *King's Bench* and in the *Common Pleas*, where the defendant was a prisoner in the *Fleet*, first, to enter the proceedings on record; Tidd, 363, 365: but, in the *Common Pleas*, where the defendant was a prisoner in any other gaol, Tidd, 365; and in the *Exchequer*, in all cases, Dax, 108; it was not necessary that the proceedings should be first entered on record.

Side bar rules  
on last day of  
term.

96. Side bar rules may be obtained on the last as well as on other days in term (*t*).

Rules enlarged  
without notice.

97. A rule may be enlarged, if the Court think fit, without notice (*u*).

Security for  
costs must be  
moved for before  
issue joined.

98. An application to compel the plaintiff to give security for costs, must, in ordinary cases, be made before issue joined (*v*).

Compounding  
penal action.

99. Leave to compound a penal action shall not be given, in cases where part of the penalty goes to the Crown, unless notice shall have been given to the proper officer; but in other cases it may (*w*).

Pleas may be  
withdrawn in  
person.

100. Where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person, without the appearance of the attorney or his clerk for that purpose before the officer of the Court (*x*).

(*t*) The last day of term was not, in the *King's Bench*, a day for side bar rules.

(*u*) Before this rule, notice must have been given before the *Common Pleas* would enlarge a rule.

(*v*) That is, unless the delay can be satisfactorily accounted for, as, if the defendant did not know the facts earlier. 5 B. & A. 702; 1 D. & R. 348; Dax's Pract. 141. It seems to have been the practice in all the Courts, that the application must be made before plea, but certainly before issue joined. 5 East, 338; 2 Chitty's Rep. 359; 1 M. & P. 30; 1 M'Cl. & Y. 213.

(*w*) This was the practice of the *Common Pleas*. 1 Taunt. 103; 5 Taunt. 268. The proper officer would seem to be the Master of the *Crown Office* in the *King's Bench*, and one of the Prothonotaries in the *Common Pleas*, and the Clerk of the Pleas in the *Exchequer*; for those officers receive the composition for the King in those Courts. Tidd, 557.

(*x*) This was the practice of the *Common Pleas*, Imp. C. P. 439; but, in the *King's Bench*, the defendant's attorney, or his clerk, came personally before the Master to withdraw the plea. 1 Ld. Raym. 345.

101. There shall be no rule for the Sheriff to return a good Jury upon a writ of inquiry, but an order shall be made by a Judge upon summons for that purpose (*y*).

No rule for good Jury but order on summons.

102. An order upon the lord of a manor, to allow the usual limited inspection of the Court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection (*x*).

Inspection of Court rolls.

103. In cases where the application for a rule to change the *venue* is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the *venue* shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the *venue* was originally laid (*a*).

Changing venue.

104. Where money is paid into Court in several actions, which are consolidated, and the plaintiff without taxing costs proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into Court (*b*).

Paying money into Court, where actions consolidated.

(*y*) This was a special rule, absolute in the first instance, in the *Common Pleas*; in the *King's Bench*, it was a common motion drawn up on counsel's signature.

(*x*) This was a rule to shew cause, in the *Common Pleas*; in the *King's Bench*, it was absolute in the first instance. Tidd, 594-5.

(*a*) In the *King's Bench*, this was a motion of course, upon counsel's signature, absolute in the first instance, 1 Chit. Rep. 691 *a*; in the *Common Pleas*, it was a rule to shew cause; and, in the *Exchequer*, a rule *nisi*, which made

itself absolute, unless cause was shewn on or before the day mentioned in the rule. 1 C. & J. 377. In the *King's Bench* and *Exchequer*, the *venue* could only be brought back upon an undertaking to give material evidence in the county in which it was originally laid; but, in the *Common Pleas*, the Court exercised a discretion; and, where the cause of action arose in several counties, the rule was discharged upon an undertaking to give material evidence in some of them. Tidd, 611, 612.

(*b*) This was the rule in the

Entry of continuances after judgment by default.

105. After judgment by default, the entry of any subsequent continuances shall not be required (c).

Discontinuance after plea.

106. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent, that, if they are not paid within four days after taxation, defendant shall be at liberty to sign a *non pros* (d).

Pleas to country need not be signed.

107. It shall not be necessary that any pleadings which conclude to the country be signed by counsel (e).

No rule to rejoin where no new matter can be pleaded.

108. In all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin (f).

Imparlances, how entered.

109. It shall not be necessary that imparlances should be entered on any distinct roll (g).

*Common Pleas*; the rule in the *King's Bench* seems to have been different. Tidd, 628.

(c) In the *Common Pleas*, there was no necessity for any subsequent continuance between the parties, after judgment by default and writ of inquiry awarded. 11 Rep. 6 b; Yelv. 97; 1 Rol. Abr. 486. But, in the *King's Bench*, it was said to be otherwise. Tidd, 569.

(d) After plea pleaded, a rule to discontinue, in the *Common Pleas*, was a rule to shew cause, unless the defendant would consent to a rule in the *Treasury*

*Chamber* in term time, or before a Judge in vacation. Imp. C. P. 723. The latter part of this rule is new.

(e) See Tidd, 671, 662.

(f) This rule seems to be new in all the Courts.

(g) There is no imparlance roll in the *King's Bench*; but, in the *Common Pleas*, where an original was issued in the first instance, or the proceedings were by bill against an attorney or member of the House of Commons, the imparlance was entered on a roll, called the imparlance roll. Tidd, 720.

110. Where a pauper omits to proceed to trial, pursuant to notice or an undertaking, he may be called upon by a rule to shew cause why he should not pay costs, though he has not been dispaupered (*h*). Pauper, when to pay costs.

## II.

AND IT IS FURTHER ORDERED, That, upon everyailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and attendance to receive debt and costs; and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and, if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation (*i*). Debt and costs to be indorsed on writ.

THE INDORSEMENT shall be written or printed in the following form:— Form of indorsement.

“ The plaintiff claims for debt,  
 “ and for costs. And, if the  
 “ amount thereof be paid to the plaintiff or  
 “ his attorney within four days from the ser-  
 “ vice hereof, further proceedings will be  
 “ stayed.”

## III.

AND IT IS FURTHER ORDERED, That, in *Hilary* and Plaintiff may declare *de bene*

(*h*) This is new. Formerly, the Court would order a party to be dispaupered who was guilty of delay; but, until this was done, would make no order about costs. Tidd, 98.

(*i*) This, which is a most salu-

tary rule, is new. It does not, however, distinctly state, that all process not so indorsed shall be irregular, and it may be questionable, whether the rule is more than directory. See *Millar v. Bowden*, 1 Cr. & Jerv. 563.

*esse* four days  
after *Hilary*  
and *Trinity*  
Terms.

*Trinity* Terms, a plaintiff in any country cause may file or deliver a declaration *de bene esse* within four days after the end of the term, as of such term (*j*).

## IV.

Recital of writs  
in declarations.

AND IT IS FURTHER ORDERED, That the rules heretofore made in the Courts of *King's Bench* and *Common Pleas* respectively, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, shall be extended and applied in the Courts of *King's Bench*, *Common Pleas*, and *Exchequer of Pleas*, to all personal and mixed actions; and that in none of such actions shall the original writ be repeated in the declaration, but only the nature of the action stated, in manner following: *viz.* *A. B.* was attached to answer *C. D.* in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be; and any further statement shall not be allowed in costs (*k*).

## V.

When bail bond,  
&c., is to stand  
as a security.

AND IT IS FURTHER ORDERED, That, upon staying proceedings, either upon an attachment against the Sheriff for not bringing in the body, or upon the bail bond, on perfecting bail above, the attachment or bail bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable; and, in a country cause, at the ensuing Assizes (*l*).

(*j*) This is also new. See R. M. 1 W. 4, Scac. *ante*, Vol. 1, p. 279.

(*k*) These rules are cited in Tidd, 433.

(*l*) Formerly, a trial was not lost, unless, by the neglect to put in and perfect bail in due time,

the plaintiff was prevented from trying his cause in, and obtaining judgment of the *same* term in which the writ was returnable, 1 Chit. Rep. 270, which could only happen, in town causes, where the venue was in *London* or *Middle-*

## VI.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission (*m*).

No costs of proving copy of public document, unless opposite party required to admit it.

## VII.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a Judge, a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such hand-writing or execution, or unless the Judge, upon attendance before him, shall indorse upon such summons, that he does not think it reasonable to require such admission (*m*).

No costs of proving handwriting, without previous summons to admit it.

## VIII.

AND IT IS FURTHER ORDERED, That, in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday,

Time, how computed.

ser, and the defendant lived within forty miles of *London*. It was said, that, in the *Exchequer*, the rule applied to country causes also.

1 Y. & J. 373.

(*m*) These regulations formed part of the recommendation of the Law Commissioners, and will be a great saving of expense.

or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also (*n*).

Commencement  
of rules.

AND IT IS FURTHER ORDERED, That the above rules shall take effect on the first day of next *Easter* Term.

TENTERDEN,  
N. C. TINDAL,  
LYNDHURST,  
J. BAYLEY,  
J. A. PARK,  
W. GARROW,  
J. LITTLEDALE,  
S. GASELEE,

J. VAUGHAN,  
J. PARKE,  
W. BOLLAND,  
J. B. BOSANQUET,  
W. E. TAUNTON,  
E. H. ALDERSON,  
J. PATTESON.

(*n*) This applies to all existing rules, and will tend to assimilate the practice of the Courts in many proceedings not noticed in the foregoing regulations.

*Exch. of Pleas,*  
1832.

### DOE *d.* BRIGGS *v.* ROE.

A declaration and notice in ejectment having been nailed upon the door of the premises, the tenant's wife called upon the person who had attempted to serve the ejectment, and requested to know what she was to do with the paper; he explained it to her, and recommended her to go to the plaintiff's attorney; she replied, she would see her husband immediately, and recommend him to do so:—*Held*, that this was not a good service.

An ejectment may be served upon the wife of the tenant in possession off the premises, provided she be living with her husband at the time.

**G**ODSON moved for judgment against the casual ejector. The party who was to serve the ejectment went to the dwelling house sought to be recovered; the outer door was locked; he knocked repeatedly; a servant maid came into the shop; he explained to her the object of his coming, and requested her to open the door, that he might serve her master (the tenant in possession); she refused to open the door or receive the ejectment; upon which he nailed the declaration in ejectment and notice to the door,

and departed. On the following day, before the first day of term, the wife of the tenant in possession came to the same person, and requested to know what she was to do with the paper, which she produced. He explained what it was, and recommended her to go to the attornies of the lessor of the plaintiff. She said she would see her husband immediately, and recommend him to do so.

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d.  
BRIGGS  
v.  
ROE.

He submitted that the admission of the wife amounted to a service upon her upon the premises, and urged that he was entitled at least to a rule to shew cause.

LORD LYNTHURST, C. B.—It amounts to nothing more than an admission by the wife that she had received the paper. There is nothing to shew that the husband was in the house.

BAYLEY, B.—This goes further than any case that I am aware of. If you had shewn that the husband was at home, or if you had served the wife when she called, it might have been sufficient. It is not necessary that the wife should be upon the premises when she is served, provided it appears by affidavit that she is living with her husband at the time (a). There is nothing to shew that the husband knew of the service.

Rule refused.

(a) *Anon.* 1 Chit. 500, n.; and 499, 1 New Rep. 308, 1 Chit. 228, see 6 T. R. 765, 2 B. & P. 55, 1 Chit. 2 Wils. 263.

### WATSON v. LOCKE.

**A** *VENIRE* having been served, by leaving a summons at the defendant's place of abode, the plaintiff issued a *dis-*

Since the statute 7 & 8 Geo. 4, c. 71, the Court will not increase issues upon a

*distringas* at common law, but, if the common law course still remains, will leave the plaintiff to act upon it as he thinks fit.

*Exch. of Pleas,*  
1832.

WATSON  
v.  
LOCKE.

*tringas de cursu* to levy 40s.; and now *Price* moved, upon reading the *distringas*, the Sheriff's return, and an affidavit of the amount of the debt, and that no appearance had been entered for the defendant, to increase the issues (a).

It has been repeatedly decided (b), that the statutes 51 Geo. 3, c. 124, and 7 & 8 Geo. 4, c. 71, do not take away the ancient common law course of proceeding by *venire* and *distringas*. The case of *Pennell v. Kingston* (c) has, however, been supposed to throw a doubt upon the older decisions. That was an application to the Court to name the sum, an application of an extraordinary nature, to which the Court refused to accede.

[*Bayley, B.*—That application was supported by an affidavit of the debt. It was always usual for the Court to fix the amount to be levied; but as it was at least questionable, whether the statutes had not taken away the right of issuing a *distringas*, and levying issues at common law, I said, in that case—if the plaintiff has a right to proceed as at common law, he may do so and levy; but the Court will not assist him by increasing the issues.]

If the question be, whether the statutes are applicable to a *distringas* issuing out of this Court, there will be no difficulty in proving that they are not. In the first place, it has been the course of decision, that they apply only where the plaintiff proceeds under the statute, with a view to enter an appearance for the defendant, and not where the proceeding is to compel the defendant to enter an appearance. The words of the two statutes, 51 Geo. 3, c. 124, s. 2, and 7 & 8 Geo. 4, c. 71, s. 5, are for this purpose the same, the only difference being that the words

(a) See *ante*, Vol. 1, p. 549, n.

2 Y. & J. 111; and *Kemp v. Sum-*

(b) See *Nicholson v. Bownass*,

*ner*, Id. 405.

3 Price, 263; *Dwerryhouse v. Graham*, Ib. n.; *Petty v. Smith*,

(c) *Ante*, Vol. 1, p. 548.

"*subpoena* and attachment," are inserted in the latter. These statutes apply to the Court of *King's Bench*, and have been acted on in the Court of *Common Pleas*: but in this Court, it has been decided, that they do not take away the common law proceeding.

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LOCKE

[*Bayley, B.*—It has been decided, that the statute 51 *Geo. 3*, c. 124, did apply to this Court. Mr. *Taunton* has a note to his report of *Moore v. Taylor* (a), to this effect:—"On this same day, the reporter heard *Peake* move in the *Exchequer* for a *distringas*, on an affidavit conformable to the statute, 51 *Geo. 3*, c. 124, that the officer had not been able to serve the process on the defendant in person. The Court granted it as a motion of course. On inquiry, he was informed that there had been a great struggle when the act first passed, whether it should be held to extend to that Court, the officers contending, *totis viribus*, that it did not, but the Court held that it did."

*Lord Lyndhurst, C. B.*—The question turns upon the construction of the statute. The words are as general as they can be, and it is for you to shew that they were not meant to extend to this Court.

*Bayley, B.*—Why should we assist you when the point, to say the least of it, is questionable? If you have the right to do so, go on and levy at your own peril; and if an action of trespass be brought against you, the question may be put upon the record; but ought we to aid you where the question is doubtful?]

There is not the same reason why the statutes should apply to proceedings by *venire* and *distringas* in this Court. The first process or proceeding upon the original writ in actions of account, &c., was a summons or warning to appear (b), which conveyed to the defendant no information. On the contrary, in this Court, the summons upon the *venire* conveys every necessary information, and admits

(a) 5 Taunt. 71.

(b) Tidd, 109, 111.

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LOCKE.

of no further explanation (a). It is a mistake to suppose that the *distringas* proceeds upon a contempt of the process. This Court proceeds *in rem*, and every suitor participates in the prerogative.

[*Bayley, B.*—In the exercise of its discretion, the Court may inquire, whether the proceeding is in fact for the king or for the subject. If an action of trespass were to be brought against the plaintiff for levying under the *distringas*, and this Court, or a Court of Error, should be of opinion, that the common law course of proceeding was taken away by the statute, it would be most distressing, and some blame would certainly be imputable to the Court which had lent its aid by increasing the issues. If the plaintiff is entitled to proceed, let him do so at his own peril.]

It is of the greatest importance that the practice should be settled upon this point.

LORD LYNTHURST, C. B.—The practice has been settled by the case of *Pennell v. Kingston*. The Court will not make an order to increase issues upon a *distringas* at common law.

BAYLEY, B.—The Court has decided that it will not increase issues upon a *distringas* at common law. If the common law right exists, parties may pursue that course at their peril; but the Court will not assist them. The intention of the Court in *Pennell v. Kingston* was, to leave the rights of the parties as it found them, and not to interfere. The note which I took of that case is this:—Since the statute 7 & 8 Geo. 4, c. 71, the Court will not increase issues on a *distringas* at common law; but if the common law course still remains, the Court will leave the plaintiff to act upon it as he thinks fit.

*Per Curiam.*

Rule refused.

(a) See the form, 3 Man. Pract. 16.

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1832.

JONES v. JONES.

**JOHN JERVIS** obtained a rule, calling upon the plaintiff to shew cause why he should not give security for costs, with a stay of proceedings in the meantime. The motion was founded upon an affidavit, which stated that the defendant resided abroad, out of the jurisdiction of the Court; and the affidavit in answer stated that no application for security for costs had been made to the plaintiff's attorney or agent. The affidavits did not state in what stage the proceedings were, and no notice was given before the motion was made.

Where the plaintiff is out of the jurisdiction of the Court, a motion for security for costs may be made without a previous application to the plaintiff's attorney; but, without such an application, the rule *nisi* will not be a stay of proceedings.

A defendant, who moves for security for costs, need not state the stage of the proceedings; it rests with the plaintiff to shew that the application is too late.

**R. V. Richards** shewed cause.—The affidavit upon which this rule was obtained is defective. It does not state that any application had been made for security for costs, nor does it disclose in what stage the proceedings were, when the application was made.

[**Bayley, B.**—The defendant makes this application at his peril, if he is too late. Does your affidavit disclose in what stage the proceedings were at that time?]

It is clear that no application was previously made. That has been decided to be a ground for refusing this rule; *Bass v. Clive* (a); and though that case has in part been overruled, yet, without a previous application, there can be no stay of proceedings (b).

**BAYLEY, B.**—I am surprised that the officer should have drawn up the rule with a stay of proceedings, without an affidavit that application had been made for security, or that notice of the motion had been given; but that circumstance cannot vary the rule which the Court ought now to pronounce. If the plaintiff is out of the jurisdiction of the Court, the defendant is entitled to have security for costs,

(a), 3 M. & S. 283.

(b) See *Baille v. De Bernales*,

1 B. & A. 331; *Hancock v. Smith*,

2 Chit. 150.

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1832.

JONES  
v.  
JONES.

unless the plaintiff shews by affidavit that the proceedings are in a stage to deprive him of that right. The defendant makes the application at his peril, and it rests with the plaintiff to shew that the application is too late.

*Per Curiam—*

Rule absolute, the costs to be costs in the cause (a).

(b) See R. H. 2 W. 4, s. 98, *ante*, p. 196.

### HEYWOOD v. JACKSON.

On the 21st November, the plaintiff ruled the Sheriff to return the writ; the Sheriff made his return as of Michaelmas Term, and, on 30th November, after the Sheriff had returned the writ, the plaintiff took out a rule for the Sheriff to bring in the body, which was dated as of the last day of Michaelmas Term, and served on the 3rd December:—The Court granted an attachment against the Sheriff for not bringing in the body.

**CHILTON** moved for an attachment against a country Sheriff for not bringing in the body. The writ was returnable on the 19th November, and on that day the plaintiff took out a rule for the Sheriff to return the writ, which was served on the 21st. The Sheriff made his return as of Michaelmas Term. On the 30th November, after the Sheriff had returned the writ, the plaintiff took out a rule for the Sheriff to bring in the body, which was dated as of the last day of Michaelmas Term, and served on the 3rd December. He cited *Buckler v. Blyth* (a), where a rule on the Sheriff to return the writ expired two days after the end of term; and a rule to bring in the body taken out the next day, but tested on the last day of term, was held regular.

BAYLEY, B.—You may take it *cum periculo*.

Rule granted (b).

(a) 3 Anstr. 779.

(b) In *R. v. The Sheriff of Cornwall*, 1 T. R. 552, it was holden that a rule to return the writ, issued in vacation, and tested as of

the next term, was irregular. There the Sheriff had been guilty of no default when the rule issued. See the rule, H. 2 W. 4, s. 11, *ante*, p. 171.

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## STEPHENS v. ROBINSON and Another.

**ASSUMPSIT** for work and labour in printing, money paid, &c.

At the trial before Lord *Lyndhurst*, C. B., at the last *London* sittings, it appeared that the plaintiff had printed a weekly periodical, called the "*Christian Advocate*," of which the defendants had been proprietors; and for printing which they had paid the plaintiff up to *Lady-day*, 1831, except a small sum which was paid into Court. The plaintiff having proved a *prima facie* case, the defendants produced the affidavit of the plaintiff from the Stamp-office, in which he had sworn that he was the printer, and *sole proprietor*, of the "*Christian Advocate*;" and it was contended, on the authority of *Marchant v. Evans* (a), and *Bensley v. Bignold* (b), that the action could not be maintained, the requisites of the statute 38 *Geo.* 3, c. 78, s. 2, not having been complied with. The learned Judge, being of that opinion, nonsuited the plaintiff, and gave him leave to move to enter a verdict. An attempt was made at the trial to distinguish some items which had been paid for the salary of the editor of the paper, and for printing and circulating cards advertising the paper; but the learned Judge thought that those items being ancillary to the illegal publication, could not be recovered.

A printer, who makes a false affidavit that he is sole proprietor of a paper, cannot sue the real proprietors for printing such paper, nor for any matter connected with or assisting its circulation.

*Spankie*, Serjt., now moved accordingly.—The defendants were clearly proved to have been the proprietors of this paper; and the plaintiff was entitled to recover against them, unless the objection on the act of Parliament be fatal. The only objection is, that the plaintiff had

(a) 8 Taunt. 142; 2 Moore, 14. v. *Duncan*, 10 B. & C. 93.

(b) 5 B. & A. 335. See *Brown*

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made an affidavit, that he was the sole proprietor, to be lodged at the Stamp-office. That certainly was not true, but might be founded upon a supposition, that the intention of the legislature was merely that there should be some ostensible person, who might be forthcoming to meet any demand for damages, or to answer any criminal charge. He might be advised, and believe, that he might give in his name as the proprietor, for the purposes of the statute, whilst the defendants, who were in point of fact the real proprietors, might remain, as between them and him, answerable to him as proprietors of the paper for the printing done by him, and entitled to the profits. The defendants were aware of what was done, and made payments, notwithstanding, as proprietors of the paper. The defendants were certainly equally criminal with the plaintiff. In *Marchant v. Evans* there was no affidavit.

[*Bayley, B.*—Is not the argument *a fortiori* in this case? If the want of an affidavit is an answer to the action, must not the falsehood of the affidavit be so likewise? In *Bensley v. Bignold*, there was a name, but not the right one. The ground of objection was, that the printer, instead of putting his own name, affixed that of another person to his work. If *Stephens* were a proprietor, he would be a partner with the defendants, and could not recover on that ground.]

They would not be partners, if, as is contended, the legal property only was in the plaintiff, and the real and equitable beneficial right in the defendants, who were substantially the equitable proprietors. By engagement between parties in such a situation, the defendants might make themselves liable for such work. They are not sued as proprietors, but for work done on their retainer, and under their employment. This employment was clearly made out by the evidence of the directions by and interference of the defendants, and by that of their former payments.

[Lord *Lyndhurst*, C. B.—In *Marchant v. Evans*, the work was done under the employment and direction of the defendants, and yet the Court held that the plaintiff could not recover.]

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In that case there was no affidavit.

[Lord *Lyndhurst*, C. B.—A false affidavit is worse: it might mislead parties. It is sufficient, however, to bring the case within the principle of *Marchant v. Evans*, if it be as bad.]

*Bayley*, B.—A civil Court will not make itself ancillary to the commission of a crime. It is impossible that a man who can read could be ignorant that he was doing wrong, in swearing that he was the proprietor of a paper in which he had no interest. There is a distinction to be made in the affidavit between the printer and proprietor.]

*Spankie*, Serjt., then endeavoured to distinguish the other items, especially the one for circulating cards of the publication.

[*Bayley*, B.—Suppose cards were issued, giving notice of a public prize fight on *Hounslow Heath*, could the printer recover?]

That is illegal in its terms.

[*Bayley*, B.—And the conduct of the parties here was illegal within the knowledge of the plaintiff.]

LORD LYNDHURST, C. B.—I have no doubt whatever on the construction of this act of Parliament. The plaintiff must have been aware of the object of the statute: he eludes the provision of it; and I thought at the trial, and still think, that the action cannot be maintained.

BAYLEY, B.—Independently of the cases of *Marchant v. Evans* and *Bensley v. Bignold*, I should have been of opinion, upon principle, that the plaintiff could not recover,

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either for printing this publication, or for any matter connected with or assisting its circulation. The statute, for wise purposes, has provided, that there shall be an affidavit which shall disclose the name of the printer and of the proprietor. Here the plaintiff takes upon himself to swear that he is the sole proprietor, as well as the printer. The ground upon which he seeks to charge the defendants is, not only that he is not the sole proprietor, but that he is in no way interested in the paper. I am of opinion that he cannot be allowed to recover against these defendants as proprietors, in opposition to his own affidavit.

GARROW, B.—Very great inconvenience would ensue, if a doubt even were to be entertained in this case. If one set of proprietors may do this, every proprietor may do the same; and then it would be the obvious consequence, that persons who deal in such hazardous commodities, would procure irresponsible persons to stand forward, and the responsible proprietors would be screened by those whose conscience was not too tender to swear that which was false; and under the beggary of such persons, the responsible proprietors would escape.

BOLLAND, B.—I think that upon the true construction of the statute, the plaintiff is precluded from recovering any part of his demand. We should be instrumental in defeating the salutary provision of the statute, if we entertained this motion.

Rule refused.

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CLUTTERBUCK *v.* WISEMAN.

ON the 29th *December*, the defendant was served with a copy of a *quo minus*, which was directed to the Sheriff of *London*, and was tested on the 25th *November*, 2 *Will.* 4. The notice required the defendant to appear on the 11th day of *January*, 1831, and the copy of the process did not purport to be signed by the Clerk of the Pleas.

The signature of the Clerk of the Pleas at the foot of a *quo minus* is merely to authenticate it, and the copy served upon a defendant need not contain such signature.

*Hoggins* moved to set aside the service of the process for irregularity, with costs. He contended that the writ was improperly directed, that the notice was to appear upon an impossible day, and that it should be signed by the Clerk of the Pleas as Prothonotary (a).

A writ directed to the Sheriff of *London* is not irregular.

Where a *quo minus* was served on the 29th *December*, 1831, and the *English* notice required the defendant to appear on the 11th *January*, 1831, the Court refused to set it aside, because the mistake could not mislead the defendant.

BAYLEY, B.—The notice cannot mislead; and the Sheriffs of *London*, though two persons, are in fact but one officer. With respect to the omission of the signature of the Clerk of the Pleas, the statute 12 *Geo.* 1, c. 29, only requires, that the defendant shall be served with a copy of the process. The signature of the officer is merely to authenticate the writ, and though the writ might be bad if the signature were omitted, yet the signature is no part of the writ, and need not appear in the copy served upon the defendant.

LORD LYNTHURST, C. B.—In the absence of authority to the contrary, this appears to me to be a sufficient service. The copy of the writ is served. It omits the signature of the officer, which, like the seal, may be necessary to authenticate the process, but is no part of the writ. The Sheriffs of *London*, though two persons, are but one officer; and the mistake in the year could not mislead, for the de-

(a) Price, Pract. 59.

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fendant must have perceived that it was a mistake, and have understood to what period the notice applied (a).

Rule refused (b).

(a) See *Page v. Carew*, ante,  
Vol. 1, p. 514.

(b) See *Cutcliffe v. Standish*,  
Pract. Reg. 354; Barnes, 405.

DOE d. SNAPE v. SNAPE and Others.

Where an ejectment is served upon a person who swears that he is in possession of no part of the premises sought to be recovered, the Court will order his name to be struck out from the appearance and consent rule, upon his undertaking to permit execution to issue for any part of the premises of which he may be in possession.

**MANNING** moved to strike out the name of *Butler*, from the appearance and consent rule, upon an affidavit, that he was in possession of no part of the premises sought to be recovered. The declaration and notice were served upon *Butler* and three other persons, and the affidavit stated a service upon the four, as tenants in possession. The ejectment was moved on the last day of *Michaelmas* Term; and an appearance was entered for all the defendants, in order that the plaintiff might not sign judgment.

The Court granted the rule absolute in the first instance, upon *Butler's* undertaking to permit execution to issue for any part of the premises of which he might be in possession.

Rule absolute.

## NEWTON v. MAXWELL.

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**JOHN JERVIS** had obtained a rule to shew cause, why the defendant, who had been arrested by the name of *William Henry Maxwell*, should not be discharged out of custody on filing common bail, and the bail bond be delivered up to be cancelled, upon the ground that the defendant's name was *William Hamilton Maxwell*, and that he had always been called and known by that name only.

*William Hamilton M.* was arrested by the name of *William Henry M.*: he had signed an agreement with the initial letters of his Christian name, in which he was described as *William Henry M.*, and, on one occasion, had told the plaintiff that his name was *William Henry M.*: the Court refused to discharge him out of custody.

*Kelly* shewed cause upon an affidavit, which stated, that the defendant had signed with the initials of his Christian name, and with his surname, an agreement between *William Henry Maxwell* of the one part, and *C. and B.* of the other part; that the defendant had on one occasion told the plaintiff that his name was *William Henry Maxwell*, and that the plaintiff had known the defendant for five years by that name only. He submitted, that this affidavit was an answer to the application; and that, if it were doubtful, the Court would not interfere, but leave the defendant to his plea in abatement.

*John Jervis, contra.*—Where a defendant has obtained credit in a particular name, the Court will not relieve him; *Walker v. Willoughby* (a); but that is not the case in the present instance. So, where a defendant executes a deed in a particular name, he is estopped from disputing that such is his name; but this is merely an agreement, not entered into with the plaintiff. The mere circumstance of the defendant having upon one occasion admitted his name to be *William Henry*, would not be sufficient to maintain an issue upon a plea of misnomer, because, whether his name be so or not, depends not upon one or two occasions, but upon a plurality of times, that he may have been so

(a) 2 Marsh. 230; 6 Taunt. 530.

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called. *Maestier q. t. v. Hertz (a)*. In *M'Beath v. Chatterley (b)*, the defendant, whose name was *Maria Louise Antoinette*, was arrested by the name of *W. S. Chatterley*, upon a bill accepted by her in that name; and, though she was known by that name, the Court discharged her.

[*Bayley, B.*—Because she was arrested not by her Christian name, but by the initials of her husband's name.]

But she had accepted the bill by the initials of her husband's name, and there was no reason why she should not be sued in that way, particularly as the Court have holden upon demurrer, that a man's Christian name may be *Jonathan* otherwise *John*. *Scott v. Soans (c)*.

*BAYLEY, B.*—I am of opinion that this rule ought to be discharged with costs. If a party will countenance another person in calling him by a name which is not his name of baptism, he is not to complain of it. The plaintiff has known the defendant for five years; he never knew him by any other name than that of *William Henry*; and, on one occasion, he asked if his name was *William Henry*, and he said that it was. It is contended, that this was but on one occasion; but why should he inquire more than once? It does not rest upon the frail recollection of individuals only; but there is an agreement in which the defendant is described by the name of *William Henry*; he signs it with his initials, adopting the name given him in the agreement; and, can it be said, after this, that he has not passed by the name of *William Henry*? The defendant must have known that he had justified the plaintiff in suing him by the name of *William Henry*; and therefore this rule must be discharged with costs.

*GARROW, B., and VAUGHAN, B., concurred.*

Rule discharged, with costs (*d*).

(*a*) 3 M. & S. 450.

(*b*) 2 D. & R. 237.

(*c*) 3 East, 11.

(*d*) See R. H. 2 W. 4, sect. 32,  
*ante*, p. 176.

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## FIELD v. BEARCROFT.

**HENDERSON** moved to enter up judgment on a warrant of attorney more than a year old. There was an attesting witness who did not join in the affidavit, but who had signed his name to the affidavit, as the commissioner before whom it was sworn, which, *Henderson* submitted, was sufficient.

On motion to enter up judgment on a warrant of attorney, the subscribing witness, if any, must make affidavit of the execution. It is not sufficient for him to sign the affidavit in the character of the commissioner before whom it was sworn.

But, *per Curiam*, that at most would be only an assertion not upon oath. The affidavit is insufficient.

Rule refused (a).

(b) See R. H. 2 W. 4, sect. 73, *ante*, p. 188.

## SMYTH v. PARSLow.

**HEATON** moved for judgment as in case of a nonsuit, on an affidavit, stating, that special bail was put in in *Easter* Term; that the plaintiff duly declared in *Easter* Term; that the defendant pleaded in *Trinity* Term; that a rule to reply was duly given; that the plaintiff accordingly replied in *Trinity* Term; and that the cause was *thereby at issue*; but that the plaintiff had not delivered the issue, or taken steps, &c., since the replication.

In an affidavit for judgment as in case of a nonsuit, it is not sufficient to swear that the plaintiff replied, and that the cause is *thereby* at issue. It must be sworn, without qualification, that the cause is at issue.

BAYLEY, B.—If the replication were the *similiter*, the cause would be at issue thereby, but not otherwise. Why is it not sworn in the usual way that the cause is at issue?—The affidavit must be re-sworn.

The rest of the Court concurring—

*Heaton* took nothing by his motion.

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ALLAN and Another v. GRIPPER and Another.

Where goods were conveyed by a carrier by water, and deposited in the carrier's warehouse for the convenience of the vendee, to be delivered out as he should want them:—*Held*, that the *transitus* was at an end, and the vendor's right to stop *in transitu* gone, although it appeared that the carrier claimed to have a lien on the goods.

**T**ROVER for 2000 oil cakes. At the trial before Lord *Lyndhurst*, C. B., at the last *London* sittings, the following appeared to be the facts of the case:—The plaintiffs were seed-pressers at *Twickenham*, in *Middlesex*. On the 6th of *December*, 1830, a verbal contract for the sale of the oil cakes in question had been made between the plaintiffs and one *Pestall*, through the agency of one *Soames*. On the 13th *December*, the bought and sold notes were exchanged in the usual way. *Pestall* carried on business at *Baldock*, in *Hertfordshire*. On the 14th *December*, the goods were shipped at *Twickenham*, on board the barge of one *Downes*, a carrier from *Twickenham* to the point where the river *Lee* falls into the *Thames*. At the junction of the *Lee* and *Thames* the goods were transhipped into the barge of the defendants, who were carriers from the mouth of the *Lee* to *Hertford*. There is no water carriage between *Hertford* and *Baldock*. On the 17th, the goods arrived at *Hertford*. On the 16th, *Pestall*, the purchaser, was known at *Mark Lane*, where the contract had been made, to be notoriously insolvent. From the 17th to the 20th, the goods remained on board the lighter; on the 19th, the plaintiffs heard of the insolvency, and on the 20th, they sent word by *Downes*, the carrier from *Twickenham* to the mouth of the *Lee*, to the defendants, desiring them not to deliver the goods to *Pestall*. Before that message, however, arrived, on the 20th, the defendants had removed the goods into their warehouse; and on receiving that message, they said, that they would deliver the goods to no one, as *Pestall* was in their debt, and they wished they were double the quantity. It appeared that *Pestall* had been in the habit for some time of having goods of this description carried up the *Lee* to *Hertford*, and that the usual course was, that the oil cakes should be deposited in the warehouse; and that if *Pestall* or his customers wanted oil cakes,

old oil cakes formerly deposited were given out, and not oil cakes recently deposited. It was contended for the plaintiffs, that the goods were still *in transitu*. The learned Chief Baron left it to the Jury to say, whether the goods had reached their place of final destination. The Jury said, that they considered that it was intended that the oil cakes should be deposited at the defendants' warehouse for the purpose of being sent to *Pestall*, or his customers, as they were wanted, and that the warehouse was the place of their final destination in the *transitus* in question; and the defendants had a verdict.

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*Jones*, Serjt., now moved for a new trial.—The question is, whether the plaintiffs had a right to stop *in transitu*, or whether the *transitus* was at an end. That would depend on the previous question, whether the defendants' character of carriers had terminated. If it had not, the plaintiffs had still a right to stop *in transitu*, notwithstanding the goods might have arrived at their final place of deposit. It ought to have been left to the Jury, whether the character of the defendants, as carriers, had terminated, and not, as the learned Judge put it, whether the goods had arrived at their place of final deposit.

[*Bayley*, B.—If they were to remain at the warehouse until some new destination was given them by *Pestall*, the *transitus* in question must be considered at an end. There are many cases which decide, that if you send goods to be delivered at a warehouse, there to abide the orders of the vendee, when they arrive at such warehouse the *transitus* is at an end, and the right of stoppage *in transitu* is consequently gone. Supposing the defendants to have had no lien, they could not, as against *Pestall* or his assignees, have relied on the interest of the present plaintiffs, or have set up as a defence that the *transitus* was continuing.]

The warehouse could not be considered as *Pestall's*; the defendants claimed to hold the oil cakes for their

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lien, and that was in their character of carriers, which never ceased. Even where a carrier has carried goods to the premises of the consignees, and has commenced the delivery, if he stop in the course of such delivery, the vendor's right of stoppage *in transitu* has been held not to have ceased. *Crawshaw v. Eades* (a). In that case, the Lord Chief Justice of the Court of *King's Bench* said, in giving his judgment—"The whole question in this case is, whether there had been a delivery or not. There is no case in which a carrier having thus begun to deliver, and afterwards discontinues, has been held to have made a complete delivery of any part of the goods." The real question is, whether the character of carrier had ceased to exist; if it had, the plaintiffs were not entitled to stop *in transitu*; if it had not, they were. Now, it is only by virtue of their character, as carriers, continuing, that the defendants could claim the lien, which it appeared from the evidence they set up, as giving them a right to retain these goods. That character might subsist, though the goods had arrived at their place of final destination; and, therefore, the question left to the Jury, as to the arrival at the place of final destination, was not decisive of the case.

[*Bayley, B.*—The question is not, whether the defendants were right in claiming to hold, but whether the property of the plaintiffs was not at an end. What the defendants said only amounted to this—"The goods are *Pestall's* goods; the *transitus* is at an end; we will not deliver to him, because we have a lien; nor to you, because the *transitus* is at an end, and your right to stop is gone.]

Lord LYNDHURST, C. B.—The facts of the case are shortly these: *Pestall* had been in the habit of employing these defendants for several years; and the course of deal-

(a) 1 B. & C. 181; 2 D. & R. 288.

ing appeared to be, that the oil cakes were carried to *Hertford* in the defendants' barge, and deposited in the defendants' warehouse, generally for many months; and evidence was given in the cause, that if *Pestall* had sent his carts for oil cakes to the warehouse at the time in question, these oil cakes would not have been sent, but those which had been a longer period in the warehouse. There was also evidence to shew, that they were so deposited for the convenience of *Pestall*, that they might be distributed to his customers, many of whom resided in the neighbourhood. I left it to the Jury to say, whether this was the place of final destination. They said, they thought that these oil cakes were to be deposited like the rest, and that the warehouse was the place of final destination and deposit. On this state of facts, it appears to me, that the *transitus* was at an end, and that the plaintiffs' right of stoppage *in transitu* was gone.

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BAYLEY, B.—It appears, by the evidence, that the defendants' warehouse was the place at which these goods were to stop, and that the warehouse was to be considered, for the purposes of depositing these oil cakes, as the warehouse of *Pestall*, the purchaser. The goods were not to be forwarded to *Baldock* without fresh orders; and they were to go, according to the evidence in the cause, to *Baldock*, or the customers of *Pestall*, as he should direct. He thus had the complete power of giving a new destination to the goods, and when they arrived at the place where they were to await such fresh destination, the destination contemplated by the plaintiffs and *Pestall* was at an end. *Crawshaw v. Eades* is perfectly distinguishable from this case. There the question was, whether the *transitus* as to any part of the goods was at an end, and the Court thought that it was not. The facts of that case were, that the goods were to be delivered at the wharf of the vendee; they reached the wharf, and part were unloaded upon it, but before any right to their possession could vest

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in the consignee, they were to be weighed, and the freight was to be paid. They had not been weighed, nor had the freight been paid, and the Court was of opinion, that the delivery was not complete, and that the vendor was not deprived of his right of stoppage *in transitu*. There is a case of *Foster v. Frampton* (a), which comes very near the present: it was there decided, that when a vendee, for his own convenience, had desired the carrier to let the goods remain in the carrier's warehouse until he should receive further directions, the *transitus* was to be considered as at an end, and the vendor was not entitled to stop *in transitu*, on the insolvency of the vendee.

In the present case, it seems to me, that the original destination contemplated by the plaintiffs was at an end, and that the goods had reached the place in which the consignee intended that they should remain, and the right to stop *in transitu* was therefore gone, and the plaintiffs were not entitled to recover.

GARROW, B., concurred.

VAUGHAN, B.—I am of the same opinion. I think that the character of carrier had ceased, and that the character of warehouseman had begun. The Jury found, that the goods were to be deposited in the warehouse like the rest. That was for the convenience of the vendee. *Crawshaw v. Eades* is perfectly distinguishable. There the Court held, that the delivery was incomplete, and that the carrier, who had a lien on the goods, might take back that part which had been landed. In this case, the goods had been deposited in the warehouse for the mere convenience of the vendee. I think, therefore, that this verdict was right, and ought not to be disturbed.

Rule refused.

(a) 6 B. & C. 107; 2 D. & R. 108.

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DOR d. ANNE MEYRICK v. MEYRICK.

**EJECTMENT** for five fields and other property. The cause was tried before *Bolland*, B., at the last Assizes for the county of *Anglesey*.

In 1739, *Thomas Meyrick* suffered a recovery, and settled his property upon himself for life, remainder to his eldest son (*William*, the second settlor), remainder to his second son (*Thomas*, the late husband of the defendant), remainder to his daughter (the lessor of the plaintiff), by the following descriptions:—"All that capital messuage called *Cefn Coch*, and all the demesne lands, meadows, pastures, and appurtenances whatsoever, to the same capital messuage belonging or appertaining, or therewith usually held or enjoyed, then or late in the occupation of &c."—"All that water grist mill, with the appurtenances, called *Melin Cefn Coch*, and the lands thereunto belonging, or therewith usually held and enjoyed, and then or late in the occupation of &c."—"All that fulling or turking mill with the appurtenances, commonly called *Pandi Cefn Coch*. All which said several messuages, tenements, mills, lands, and premises were situate, lying, and being, in the

*W. M.*, tenant in tail of the *Cefn Coch* property, which consisted of a mansion-house and thirteen closes, formerly in one occupation, a corn-mill called *Melin Cefn Coch*, and a fulling-mill called *Pandi Cefn Coch*, with the lands thereunto belonging, in 1816 suffered a recovery, and in the recovery deed declared his intention to convey the property thereafter particularly mentioned, and settled "All those the capital mansion house, messuage, or tenement, with the several out-offices, gardens, plantations, and hereditaments thereunto be-

longing, commonly called or known by the name of *Cefn Coch*; And also those fields, closes, pieces or parcels of land or ground and hereditaments, (eight in number), commonly called or known by the several names, &c. (naming them), being parts and parcels of the demesne lands of *Cefn Coch*, in the holding or occupation of *T. M.*, together with all and singular houses, out-houses, edifices, buildings, &c., lands, meadows, &c., hereditaments and appurtenances whatsoever, to the said capital messuages, tenements, lands, hereditaments, and premises belonging, or in anywise appertaining, or therewith or with any part or parcel thereof usually set, let, held, occupied, or enjoyed, or accepted, reputed, taken, or known for, as part, parcel, or member thereof, or appurtenant thereto, or to any part or parcel thereof." Upon the death of *W. M.*, *T. M.* entered into possession of the property not conveyed by *W. M.*, and suffered a recovery of, and settled, the mills and lands thereunto belonging by the following description:—"All that corn-mill, with the appurtenances called *Melin Cefn Coch*, and the lands thereunto belonging, and then better known by the name of *Tyddyn y felin Cefn Coch*, and all that fulling-mill called *Pandi Cefn Coch*; and all those five fields, closes, pieces, or parcels of land, part of *Tyddyn y felin Cefn Coch*, containing by estimation thirty-four acres, or thereabouts, and all houses, &c., and all lands, &c. in which *T. M.* had any estate, and the reversion and reversions &c., and all the estate, &c. of *T. M.*" The five fields, part of the *Cefn Coch* property not named in the recovery deed of 1816, consisted of about thirty-four acres:—*Held*, that the previous particular enumeration in the deed of 1816 confined the operation of the subsequent general words, and that the mansion house and eight fields only passed by that deed:—*Held*, also, that the five fields, formerly parcel of *Cefn Coch*, and not named in the recovery deed of 1816, passed by the recovery deed of 1824 by the description of "All those five fields, &c."

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parish of *Llanfechell*, in the county of *Anglesey*." *Thomas Meyrick*, the first settlor, died in 1763; and *William*, his eldest son, entered into possession of the estates. In 1816, *William Meyrick*, for the purpose of cutting off the entail of and in the capital messuage, tenement, lands, hereditaments, and premises thereafter (in the recovery deed) particularly mentioned, suffered a recovery, and settled upon his sister (the lessor)—"All those the capital mansion house, messuage, or tenement, with the several out offices, gardens, plantations, and hereditaments thereunto belonging, commonly called or known by the name of *Cefn Coch*, situate, lying, and being in the parish of *Llanfechell*, in the county of *Anglesey*;—And also those fields, closes, pieces or parcels of land or ground and hereditaments, (being eight in number), commonly called or known by the several names of &c., (naming them), being parts and parcels of the demesne lands of *Cefn Coch* aforesaid, all situate in the parish of *Llanfechell* aforesaid, and in the holding or occupation of *Thomas Meyrick*;—Together with all and singular houses, out-houses, edifices, buildings, barns, stables, yards, gardens, orchards, lands, meadows, leasows, pastures, ways, wastes, waters, watercourses, hedges, ditches, walls, mounds, banks, fences, timber and other trees, woods and under-woods, commons, paths, passages, easements, privileges, profits, commodities, emoluments, advantages, rights, members, hereditaments, and appurtenances whatsoever, to the said capital messuage, tenement, lands, hereditaments, and premises belonging, or in anywise appertaining, or therewith or with any part or parcel thereof usually set, let, held, occupied, or enjoyed, or accepted, reputed, taken, or known for as part, parcel, or member thereof, or appurtenant thereunto, or to any part or parcel thereof." The estate of *Cefn Coch* consisted of a mansion house and thirteen fields. At this time, *William* and *Thomas Meyrick* resided together at the mansion, but *Thomas* occupied the land; formerly, the thirteen closes and the

mansion house had been occupied together. *William Meyrick* died in 1819, and left by will other real property to his sister the lessor of the plaintiff. Upon the death of *William* without issue, *Thomas*, the second son of *Thomas*, and the husband of the defendant, entered, and suffered a recovery, and by deed to make a tenant to the *præcipe*, reciting the settlement of his father, and that he was desirous of suffering a recovery so far as related to the hereditaments and premises thereafter described, for the purpose of docking all estates tail of and in the premises thereafter mentioned, conveyed to &c., in trust for his wife in fee, *inter alia*—"All that water corn grist mill, with the appurtenances, called *Melin y Cefn Coch*, and the lands thereunto belonging, and therewith usually held and occupied, and formerly in the holding of &c., and then better known by the description of all those the messuage, tenement, lands, and hereditaments, called or known by the name of *Tyddyn y felin Cefn Coch*, together with the water and wind corn grist mills, drying kilns, hereditaments, and premises thereto belonging; situate, lying, and being in the parish of *Llanfechell*, in the county of *Anglesey*, and then or late in the tenure of &c.—And also all that fulling or turking mill, with the appurtenances, commonly called by the name of *Pandŷ Cefn Coch*, &c.—And all those five fields, closes, pieces or parcels of land or ground, part of *Tyddyn y felin Cefn Coch* aforesaid, situate, lying, and being in the parish of *Llanfechell*, in the county of *Anglesey*, and containing by estimation thirty-four acres, or thereabouts; Together with all houses, &c.—And all other the messuages, lands, tenements, and hereditaments, situate, lying, and being in the several parishes of *Llanfechell*, *Llanrhyddlad*, *Llanfaethly*, and *Llanddausaint*, in the county of *Anglesey*, in which the said *Thomas Meyrick* had any estate or interest in tail, at law, or in equity, and every part and parcel of the same, with their and every of their appurtenances;—And the reversion and reversions, &c.—And all the estate, right, title, and interest of the said *Thomas Meyrick*."

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The defendant claimed the five fields, parcel of the farm of *Cefn Coch*, under the recovery deed of 1824, contending, that, by the recovery deed of 1816, the eight closes named only passed, and, as to the residue of the property, set up a tenancy. The plaintiff contended, that the whole of the *Cefn Coch* farm passed by the recovery deed of 1816, and that, if they did not, the five fields, the residue of that farm, were not included in the recovery deed of 1824; so that the lessor of the plaintiff would take as tenant in tail under the recovery deed of 1739; and as to the tenancy, the plaintiff gave evidence of a disclaimer. The five fields in question were about thirty-four acres. The learned Judge was of opinion, that the five fields did not pass by the recovery deed of 1816, and were included under the description "all those five fields, &c." in that of 1824; and the Jury having found against the disclaimer, the defendant had a verdict.

*John Jervis* obtained a rule to shew cause why the verdict should not be set aside and a new trial had; against which—

*Follett and Welsby* shewed cause.—The deed of 1816 passed only the mansion house and the eight fields named. This is obvious from the recital of that deed, and the particular enumeration of the closes which are described to be parts and parcels of the demesne lands. The settlor does not profess to suffer a recovery of the whole farm of *Cefn Coch*, but of the fields named merely. But some stress will be laid upon the general words of that deed. Effect may be given to those words consistent with the other parts of the deed, by referring them to the premises and lands particularly described; but to hold that they pass the whole farm, would be inconsistent with the intention of the settlor, to be collected from the deed, because the expression of particular closes raises an inference that the closes not named were not intended to pass.

But it is said, that the five fields are not included in the deed of 1824, and pass to the lessor of the plaintiff as tenant in tail. The *Cefn Coch* farm consists of thirteen closes, eight only are disposed of by the deed of 1816, and the remaining five consist of about thirty-four acres. This clearly identifies these fields with the five fields mentioned in the deed of 1824. The plaintiff can point out no other lands to which this description would apply. Independently of this description, the general words are sufficient to pass those fields. The words are not qualified, and would carry every thing to which *Thomas Meyrick* was entitled. *Doe d. Pell v. Jeyes (a)*, *Attorney-General v. Vigors (b)*, *Church v. Munday (c)*.

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They argued also upon the evidence.

*R. V. Richards, John Jervis, and Lloyd, contra.*—The Court cannot travel out of the deed of 1816, and must construe it most strongly against the grantor. If possible, also, effect must be given to every word; and it is not like a will upon which each party is entitled to a favourable construction. Nothing can be collected from the recital, which refers to the description in the parcels; and if the parcels are sufficient to carry the whole, the recital will be satisfied. The first branch of the parcels would pass the whole farm of *Cefn Coch*, for the word 'tenement' comprehends as much as 'hereditament,' a word of very large signification (*d*). But it is said, that the specific enumeration excludes the otherwise general effect of the deed. Many considerations might have influenced the grantor specifically to name these eight fields. The whole farm had formerly been in one occupation, and these fields might have been severed. It is obvious from the deed that they were at the time in the occupation of *Thomas Meyrick*. The general words are, however, sufficient to carry the whole. Upon these the question is, what was generally

(a) 1 B. & Ad. 593.

(b) 8 Ves. 256, 296.

(c) 15 Ves. 406.

(d) Shepp. Touch. 91.

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known as *Cefn Coch*? and it was proved to consist of the thirteen closes. In *Doe d. Davies v. Williams* (a), the lessor of the plaintiff claimed under a conveyance of all that messuage, mill, and lands, called the clock mill, in the possession of &c., and all lands and meadows to the same messuage or mill belonging, or used, occupied, or enjoyed, or deemed or accepted as part thereof; the lands in dispute were holden for the remainder of a term of one thousand years, but had been occupied with and reputed parts of the clock mill estate from 1748 to 1785; the defendant objected that these lands did not pass by the deed; but the Court held that a deed must be construed most strongly against the grantor, and that the lands did pass. The words in that case are similar to the present; and if that case be law, it must govern this.

[*Bayley, B.*—There the possession followed the deed.]

*Doe d. Pell v. Jeyes, Attorney-General v. Vigors*, and *Church v. Munday*, are authorities for the plaintiff upon this point.

With respect to the second question, no evidence was given to identify these five fields with the description in the deed of 1824; and it is clear from all the deeds taken together, that the description “all those five fields, &c.” in the deed of 1824, does not apply to these fields. In 1739, *Cefn Coch* and *Melin Cefn Coch* are described as different properties in different occupations; between that time and 1824, *Melin Cefn Coch* had acquired a different name. *viz. Tyddyn y felin Cefn Coch*, (that is, the house of the mill of *Cefn Coch*); probably the fields of that tenement, which passed by the word “lands” in the deed of 1739, had been severed from the mill; and therefore it was necessary to have a particular enumeration of them in the deed of 1824. This is a probable construction; and, without further evidence, the description cannot be applied to these identical fields. But reliance is placed upon the general

(a) 1 H. Bl. 25.

words. The deed contains a particular enumeration of the tenements to be conveyed, and no intention to convey more than is enumerated can be collected from the instrument. The general words are therefore repugnant to the previous intention, and, being subsequent, must be rejected. In a deed, general words must be qualified by previous special words. *Thorpe v. Thorpe* (a). *Attorney-General v. Vigors*, and *Church v. Munday*, were upon wills, where the rule is different; and in *Doe d. Pell v. Jeyes*, an intention to convey the whole was apparent on the deed, because the settlor gave his household furniture upon the premises in question to the lessor of the plaintiff.

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They contended also, that the plaintiff was entitled to a new trial upon the evidence as to the disclaimer, which affected the plaintiff's claim to the possession of other property.

*Cur. adv. vult.*

LORD LYNTHURST, C. B., now delivered the judgment of the Court—

By the deed of 1739, *Thomas Meyrick*, the first settlor, conveyed *Cefn Coch* by a general description, and settled it on himself for life, with remainder to his first and other sons, remainder to his daughter, the lessor of the plaintiff.

At this period, the property consisted of a capital mansion house, thirteen closes or parcels of land, a corn grist mill, a fulling mill, and also certain closes belonging to each of those mills. Other property is also included in the deed, which is immaterial to the present question.

*William Meyrick*, the eldest son, took under this entail, and in 1816 suffered a recovery of part of the property. The recovery did not extend to either of the mills, or to the lands belonging to them. In the recovery deed he declares his intention to convey the property thereafter particularly mentioned, and then specifically mentions the

(a) 1 Ld. Ray. 236.

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capital mansion house, with the appurtenances and certain closes, naming them, and describing them as being parts and parcels of the demesne lands of *Cefn Coch*, and in the holding or occupation of *Thomas Meyrick*.

Pausing here, it seems to be impossible to say that the settlor intended to convey the five closes in question. The whole of *Cefn Coch* consisted of thirteen closes, in addition to the mansion house and mills. He states his intention to convey that part which is particularly mentioned, and he mentions the mansion house and eight fields only, and says that they are parts and parcels of the demesne lands of *Cefn Coch*.

But then, reliance is placed upon the general words which follow this particular description. We are of opinion, however, that these general words following so precise a description of these closes cannot have the construction contended for. In the case of *Lord North v. The Bishop of Ely* (a), "the predecessor of the Bishop had made a lease to Lord *North* of his manor house and the site thereof, and of certain particular closes and demesnes by particular names, (and of all other his lands and demesnes); upon which it was questioned whether an ancient park and copyhold land there should pass; and, by the rule of the Court, neither of them did pass by those latter general words, for that neither the park nor yet the copyhold could be intended for to be demesnes; and that, in such cases, a grant shall not be construed by any violent construction, but according to the intention of the law; and, therefore, it is said, in *Plowden's Commentaries*, fol. 106, in *Hill and Granger's* case, that *ex præcedentibus et consequentibus optima fiat interpretatio*, and that *benigne faciendæ sunt interpretationes*; and the same to be according to the intention of the parties." We are of opinion, therefore, that the five closes do not pass by this deed.

The next question is, whether the five closes passed by

(a) Cited 1 Bulstr. 100.

the deed of 1824. *Thomas Meyrick*, in that deed, recites the deed of 1739, and that *William* had died without issue, having done nothing to bar the estate tail in the lands therein comprised, and he conveys the mills to which I have alluded, and the lands belonging to them, and also five fields by this description: "And also all those five fields, closes, pieces or parcels of land or ground, part of *Tyddyn y felin Cefn Coch*, situate, lying, and being in the parish of *Llanfechell* aforesaid, in the said county of *Anglesey*, and now or late in the holding of the said *Thomas Meyrick*, his undertenants or assigns, and containing, by estimation, thirty-four acres or thereabouts." The question is, whether, under that description, the five closes passed? They correspond in point of number and in point of quantity, and there are no other five closes which answer that description. We should, therefore, be of opinion, if it stopped there, that these five closes passed by this description. But it is objected, that these fields are described, not as parcels of the demesne lands of *Cefn Coch*, but as parts of *Tyddyn y felin Cefn Coch*. They would not be parcels of the demesne lands of *Cefn Coch*, because, by the conveyance of 1816, they were severed from the demesnes. They could not be part of *Tyddyn y felin Cefn Coch* as it formerly existed, because the property annexed to the mill comprised only eleven acres (*a*); and, therefore, these fields must have been recently annexed to the mill. They surround the mill (*b*), and no other five fields correspond in point of quantity. We are therefore of opinion, that the five fields did pass by the deed of 1824, and the consequence will be, that the defendant is entitled to these fields (*c*).

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(*a*) This appeared from the plans produced at the trial.

(*b*) This also appeared from the plans.

(*c*) The case stood over, for the

parties to compromise. The opinion of the Court upon the evidence was delivered upon a subsequent day.

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The evidence went to the Jury, and it was a question peculiarly for their consideration.

Rule discharged.

DOE d. BARNEY and Others v. ADAMS.

Where, by lease, mortgagee demised, and the executrix of mortgagor demised and confirmed, and a power of re-entry was reserved to them or either of them:—*Held*, that it operated as the demise of the mortgagee, and the confirmation of the mortgagor's representative; that the re-entry enured to re-vest the estate in the mortgagee; and that a count in ejectment, laying the demise jointly in the two, was not sustainable.

**EJECTMENT** for a forfeiture by non-payment of rent and non-insurance, brought against the assignees of a lease by indenture, dated 7th *March*, 1826, between *Joseph Barney*, mortgagee of the premises thereafter described, and intended to be thereby demised, of the first part; *Margaret Doyle*, widow, sole acting executrix named and appointed in and by the last will and testament of *John Doyle*, deceased, (the mortgagor), of the second part; and *Nathan Lewis Doyle*, of the third part: whereby the said *Joseph Barney*, at the request and appointment of the said *Margaret Doyle*, demised and leased, and the said *Margaret Doyle* demised, leased, ratified, and confirmed, unto the said *Nathan Lewis Doyle*, his executors, administrators, and assigns, the premises sought to be recovered—To hold to the said *Nathan Lewis Doyle*, his executors, &c. from *Christmas-day*, 1824, for and during, and unto the full end and term of twenty-one years thence next ensuing, at the yearly rent of 45*l.*, payable to the said *Margaret Doyle*, her executors, administrators, and assigns, by quarterly payments, on &c. And the said *Nathan Lewis Doyle*, for himself, his heirs, executors, and administrators, thereby covenanted, promised, declared, and agreed, to and with the said *Joseph Barney*, his heirs, executors, and administrators, and also to and with the said *Margaret Doyle*, her executors, administrators, and assigns, that he, the said *Nathan Lewis Doyle*, his executors, administrators, and assigns, should and would, from time to time, and at all times during the continuance of the said term, pay, or cause to be paid, to the said *Margaret Doyle*,

her executors, administrators, and assigns, the said yearly rent of 45*l.*, at the days and times therein before appointed for payment thereof, &c. And also, that he the said *Nathan Lewis Doyle*, his executors, administrators, and assigns, should and would, at his and their own costs and charges, keep the said messuage, or tenement and premises, from time to time, during the continuance of the said term thereby demised, insured from loss or damage by fire, &c. &c. &c. And it was thereby provided, and the indenture was upon this condition, that if the said yearly rent of 45*l.*, thereby reserved and made payable, or any part thereof, should be in arrear and unpaid by the space of twenty-one days next over or after any of the days or times thereinbefore appointed for payment thereof, being lawfully demanded; or if the said *Nathan Lewis Doyle*, his executors, administrators, or assigns, should not well and truly observe, perform, fulfil, and keep all and singular the covenants and agreements thereinbefore contained, which by him and them were, or ought to be, kept, observed, or performed, according to the true intent and meaning of those presents, then, and from thenceforth, that demise or lease, and the covenant for quiet enjoyment thereafter contained, should wholly cease, determine, and be void; and the said *Joseph Barney* and *Margaret Doyle*, or either of them, their, or either of their, executors, administrators, and assigns, should, or lawfully might, at, or immediately, or at any time after such breach, non-observance, or non-performance, enter into or upon the said thereby demised premises, or any part thereof in the name of the whole, and repossess, retain, and enjoy the same, as of his and their former estate, and as if those presents had not been made, any thing therein contained to the contrary thereof in anywise notwithstanding.

The declaration contained three demises:—*First*, by *Joseph Barney* and *Margaret Doyle*; *secondly*, by *Margaret Doyle*; and, *thirdly*, by *John Henry Taylor*, a subse-

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quent mortgagee, in whom the legal estate had been vested, by conveyances subsequent to the lease.

At the trial, before Lord *Lyndhurst*, C. B., at the last Middlesex sittings, no evidence was given of the title in *Taylor*; but the lessors of the plaintiff rested their case on the lease.

It was objected for the defendant, that there was no count laying a demise in *Joseph Barney* alone, in whom the legal estate appeared to be vested; and that the plaintiff could not succeed upon the joint demise of *Barney*, the mortgagee, and *Doyle*, the representative of the mortgagor.

The learned Chief Baron reserved the point; and the plaintiff had a verdict, with leave for the defendant to move to enter a nonsuit.

*Manning* accordingly, in this term, obtained a rule to enter a nonsuit, against which cause was now shewn by—

*Andrews*, Serjt., and *Steer*.—It must be admitted, that there is no count applicable to an estate in *Barney* alone; but the lease is by *Barney* as mortgagee, and by *Margaret Doyle* as executrix of the mortgagor; the one demises and leases, and the other demises, leases, ratifies, and confirms. The proviso for re-entry on the breach of covenant expressly gives the power of re-entry to *Barney* and to *Margaret Doyle*, or either of them. The covenants are with both, and the rent was reserved to *Margaret Doyle*: it was surely competent for the parties to stipulate that she should have the power to re-enter in conjunction with the mortgagee.

It does not lie in the mouth of the assignee of the lessor, to say that the lessees had no power so to demise or stipulate. They then cited *Doe d. Bedford v. White (a)*.

(a) 4 Bing. 276.

*Manning, contra.*—A right of entry cannot be reserved to a stranger, but only to the lessee. *Treport's* case (a) is expressly in point. “In an *ejectione firmæ*, the plaintiff declared on a lease made by *A.* and *B.*, and, on not guilty pleaded, the Jurors gave a special verdict, *viz.* That *A.* was tenant for life, the remainder to *B.* in fee; and that they both, by deed indented, joined in a lease to the plaintiff; and that *A.*, the tenant for life, was alive: and whether this should be adjudged in law the lease of both or not, the Jury doubted; and it was resolved, that presently, by the delivery of the deed, it is the deed of *A.* during his life, and the confirmation of *B.*; and, after the death of *A.*, it is the lease of *B.*, and the confirmation of *A.*, according to the opinion of *Dyer* and *Brown*, *Mich. 6 & 7 Eliz.* And, because the plaintiff had declared on a joint demise of *A.* and *B.*, it was adjudged against the plaintiff.” That case is stronger than the present, because, in this case, the parties do not pretend to demise jointly, but the one demises, and the other expressly confirms. In *Treport's* case, the demise purported to be joint.

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LORD LYNTHURST, C. B.—There is no separate demise by *Barney*, the mortgagee. It is said, that there is a joint power of re-entry to mortgagor and mortgagee; but in that re-entry they are to be possessed as of their former estate. The title is explained in the lease, and the estate, by re-entry, must be taken with reference to that. The moment the re-entry takes place, it enures to the benefit of the person having the legal estate. If the word “confirm” had not been used, still the word “demise” would only have operated as the confirmation of the mortgagor.

BAYLEY, B.—The proviso operates to give the right to re-enter to *Barney* whilst his estate lasts, and to *Mar-*

(a) 6 Rep. 15.

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*garet Doyle* when her estate commences. The lease is the lease of *Barney* until the mortgage is paid off, and the confirmation of *Margaret Doyle*; after the mortgage is paid off, it would become the lease of *Margaret Doyle* and the confirmation of *Barney*. *Margaret Doyle* had no right to the possession. She had merely a right to confirm. A party, in whom there is no reversion, cannot have the right to re-enter. The moment there is an entry, it vests the legal estate in *Barney*. There is no instance in which the mortgagor and mortgagee have been held to have a joint interest. It might be very prudent to have the lease from both, so as to operate as a demise from one and a confirmation by the other, whilst the interest of the mortgagee lasted, and as a lease from the mortgagor after the interest of the mortgagee determined.

On the suggestion of the Court, the defendant subsequently gave up the premises on being paid his costs.



#### WRIGHT v. HOOPER.

Where a writ was to take *Christopher Hooper*, and the *English* notice was directed to *Christopher Wood*, the Court set aside the service for irregularity, with costs.

THE defendant was served with a copy of a *quo minus*. The writ directed the Sheriff to take *Christopher Hooper*; the *English* notice at the foot of the writ was directed to *Christopher Wood*. On a former day, *Thesiger* had obtained a rule to shew cause why the service of the process, and all subsequent proceedings, should not be set aside for irregularity, with costs.

*Hulme* shewed cause.—He contended, that the rule ought to have been to set aside the service of the copy of the process; and argued, that the copy of the process served was regular, because the defendant was properly

described in the body of the writ; and the notice was merely to inform him of the object of the process, and when he was to appear, and could not mislead the defendant.

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*Per Curiam.*

Rule absolute, with costs (a).

(a) By the stat. 12 Geo. 1, c. 29, (amended by 5 Geo. 2, c. 27, made perpetual by 21 Geo. 2, c. 3, and extended to inferior Courts by 19 Geo. 3, c. 70, s. 2), where the cause of action is notailable, the defendant must be served with a copy of the process, upon which shall be written an *English* notice, &c. This notice is only necessary on the copy of the process served, and need not be on the writ itself;

*Lloyd v. Maurice*, 9 East, 528; but still, where the defendant's name has not been inserted in the notice, *Behema v. James*, 1 Wils. 104, and also where his Christian name has been omitted, *R. v. Sheriff of Middlesex*, 1 Chit. Rep. 398, — *v. Snow*, Tidd, 167, 1 Chit. Rep. 506, the Courts have set aside the service of the copy of the process as irregular.

DAVIES v. MORGAN and Others.

**E. v. WILLIAMS** moved that service of the *quo minus* upon the wife of one of the defendants, who was abroad, might be deemed good service in this, which was an action *ex contractu*, unless the other defendants would undertake not to plead in abatement. He urged, that the plaintiff could proceed in no other mode in this Court, in which there was no outlawry.

Where one of several defendants in an action *ex contractu*, is abroad, the Court will not order that service of the process upon the wife of such defendant may be deemed good service, nor restrain the other defendants from pleading in abatement.

LORD LYNTHURST.—We cannot grant this application. In such a case the plaintiff should sue in a Court in which he may proceed to outlawry.

Rule refused.

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SCOTT, *quæ tam*, &c. v. MARSHALL and Another, Sheriff of  
MIDDLESEX.

In an action against the Sheriff for the extortion of his officer, the plaintiff proved an examined copy of the writ on which the officer's name was indorsed, and that a person of that name actually executed the writ, and that the course of the Sheriff's office was, that the name of the officer to whom the warrant was granted was usually indorsed on the writ:—  
*Held* sufficient *prima facie* evidence to connect the Sheriff with the acts of the officer.

**D**EBT against the Sheriff of *Middlesex* for extortion in the execution of mesne process.

On the trial, before Lord *Lyndhurst*, C. B., at the *Westminster* Sittings after last term, it appeared, that one *Radford* had executed the process and taken the money, which was alleged by the plaintiff to have been taken extorsively. To connect the Sheriff with the act of *Radford*, the plaintiff offered in evidence an examined copy of the writ, as returned by the Sheriff; upon which was indorsed "*Radford & Co.*"

Evidence was given by Mr. *Burchell* of the under-sheriff's office, that writs generally came into the office with the name of the officer who was to execute the writ indorsed upon them by the attorney for the plaintiff, and that the officer whose name was so indorsed was generally adopted; but if not, the name was struck out, and the name of another officer was inserted, who was to execute the writ; and if the writ came to the office without such indorsement, it was indorsed in the office. He said also, that it might sometimes happen, that an alteration might take place as to the officer who was to execute the process without the indorsement on the writ being altered, but that such alteration would appear from a book kept in the Sheriff's office.

The defendants' counsel objected to the reception of the copy of the writ and return in evidence, which was, however, received by the learned Lord Chief Baron, and the plaintiff had a verdict, with liberty for the defendants to move on this and other points (a).

(a) The Jury found that the money was not taken for the personal benefit of the Sheriff, which *Burchell* contended, upon the con-

*Burchell* now moved accordingly. — Though this has been a point which has been often debated, the authorities are decisive, not only that the copy of the writ is insufficient evidence, but that the writ itself, if produced with the indorsement in question, would not have been evidence to connect the Sheriff with the act of the officer. The writers on evidence all agree in laying down the proposition as contended for on behalf of the present defendants.

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In *Roscoe on Evidence* (a) it is stated, “if the warrant remains in the hands of the bailiff as if executed, (it usually does for his justification), a *subpœna duces tecum* should be served upon the bailiff. If it has been returned to the Sheriff’s office, a notice to produce should be given, and secondary evidence will then be admissible.” “It is not sufficient to produce an examined copy of the precept with the bailiff’s name indorsed on it, though the Sheriff has returned *cepi corpus*. *Martin v. Bell* (b). So, where an examined copy of the writ and return, with the bailiff’s name written on the margin, was produced, Lord *Ellenborough* held it insufficient to connect the Sheriff with his acts. *Jones v. Ward* (c), *Hill v. Sheriff of Middlesex* (d), *Morgan v. Brydges* (e).” Mr. *Phillips* says (f)—“To con-

struction of the stat. 23 H. 6, c. 9, amounted to a verdict for the defendants. He admitted that the Sheriff would be liable in case for the act of his officer; but submitted, that he was not liable in the action given by the statute, because a distinction was drawn between the reward to the Sheriff and the officer. And he relied upon the language of *Ashhurst, J.*, and *Buller, J.*, in the case of *Woodgate v. Knatchbull*, 2 T. R. 154, *et seq.*

He also moved in arrest of judgment, upon the ground that the statute 23 H. 6, c. 9, was re-

pealed by the stat. 32 G. 2, c. 28, and cited *Martin v. Bell*, 6 M. & S. 220; *Martin v. Slade*, 1 N. R. 59; *Jaques v. Whitcomb*, 1 Esp. 361; *Lovell v. Simpson*, 3 Esp. 153; *George v. Perring*, 4 Esp. 63, and *Boldero v. Moss*, 5 T. R. 417.

The Court directed these points to be stated in a special case, but the cause was subsequently compromised.

(a) Page 483.

(b) 1 Stark. N. P. C. 413.

(c) 3 Camp. 228.

(d) Holt, 217; S. C. 7 Taunt. 8.

(e) 2 Stark. 314.

(f) Page 266, 6th edit.

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nect the Sheriff with the acts of a particular officer in the execution of a writ, it will not be sufficient to produce an examined copy of the writ and return, with proof that the name indorsed is the name of the Sheriff's officer, although it should appear to be the usual practice in the Sheriff's office to indorse upon the writ, before it (the warrant) issues, the name of the officer who is to execute the warrant." And he adds in a note, that, " particularly, *Hill v. The Sheriff of Middlesex* has fixed the rule."

It is true, that the authorities are conflicting; but, upon examination, they will be found to resolve themselves into the principle above stated.—*First*, then, as to the cases in which such evidence has been received. In *Blatch v. Archer* (a), the first upon the subject, the point was not made at the trial; and it does not distinctly appear from the report how the question arose; and, therefore, that case is entitled to no weight. The next case is *M'Neil v. Perchard* (b): that was an action against the Sheriffs of London, and it was proved to be the practice, to indorse in that office the name of the officer to whom the warrant was directed: it is not, therefore, applicable to a case in which, by the practice of the office, the writ is indorsed before it comes to the office, and the officer may subsequently be changed; for the indorsement in the office is an admission by the Sheriff, that the warrant was granted to a particular officer. The same observation applies to *Tealby v. Gascoigne* (c), and *Bowden v. Waithman* (d), in which the like evidence was received. In *Fermor v. Phillips* (e), the officer was called as a witness; and, in *Francis v. Neave* (f), the name of the bailiff was proved to have been indorsed in the Sheriff's office. On the other hand, there are cases, which decide that such evidence is not admissible.

(a) Cowp. 63.

(b) 1 Esp. N. P. 263.

(c) 2 Stark. N. P. 205.

(d) 5 Moore, 183.

(e) 5 Moore, 184, n. 3 B. & B. 27, n.

(f) 2 B. & B. 26.

In *Hill v. The Sheriff of Middlesex* (a), the same point was taken, and the evidence was rejected. *Gibbs*, C. J., who was well acquainted with the practice of the Sheriff's office, observed—"It is said, that the Sheriff and the officer are connected by the indorsement on the writ; it is not so, unless the plaintiff can shew that the officer's name was indorsed upon the writ, by the authority of the Sheriff. The writ is only evidence against the Sheriff, to the extent of his duty upon the writ, and it is no part of his duty to annex the name of the officer to the return. The name of the officer might have been indorsed by the plaintiff himself or his attorney." This case was affirmed in *banc* (b).

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[*Bayley* B.—There was no evidence in that case of the course of the office.]

It certainly does not appear from the report, but the language of the Chief Justice is not directed to that point; he says generally, that the warrant must be traced to the Sheriff. The general course of office raises only an implication, that the warrant was granted to the officer named; it may have been given, notwithstanding, to another officer; and the Sheriff would be fixed by an act not in the course of his duty. In *Morgan v. Brydgc* (c), evidence was given of the course of the office of the Sheriff of *Middlesex*; but nevertheless, *Abbott*, C. J., rejected the evidence. That case was in every respect similar to the present. And in *Jones v. Wood* (d) Lord *Ellenborough* rejected similar evidence, although it was contended, that, by the course of the office, the indorsement meant that the warrant was directed to a particular officer. So, in *Martin v. Bell* (e), the course of the office was proved, and the name of the bailiff had been indorsed on the writ; but Lord *Ellenborough* held, that it was necessary, either to

(a) *Holt*, N. P. 217.

(b) 7 *Tannt.* 8.

(c) 2 *Stark*. N. P. 314.

(d) 3 *Camp.* 229.

(e) 1 *Stark*. N. P. 413.

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produce the warrant, or to shew some recognition on the part of the Sheriff of the agency of the officer. In *Fonsick v. Magnay* (a) the question was, whether the indorsement of the name of *Owen*, the officer, upon the writ, was sufficient to fix the Sheriff of *Middlesex* with the acts of the officer; and *Gibbs*, C. J., was of opinion that it was not.

At all events, the examined copy of the writ could not be evidence; for the indorsement was no part of the return or of the record, but a mere memorandum of the Sheriff, which it is not part of the duty of the Sheriff to indorse; and, if not part of the record, it could not be proved by an examined copy.

Lord LYNTHURST, C. B.—The cases which have been relied upon are principally *Nisi Prius* decisions. The question came before the Court of *Common Pleas* in the cases of *Fermor v. Phillips*, *Francis v. Neave*, and *Bowden v. Waithman*; and that Court deliberately decided that such evidence was sufficient. I do not say that the evidence is conclusive, but the indorsement is *prima facie* evidence: and if the warrant was granted to a different officer, the Sheriff, by reference to his book, has the means of proving that fact, and of rebutting the presumption which arises from the indorsement. A recognition by the Sheriff of the act of the bailiff dispenses with other proof that the bailiff acted under due authority; and the course of office amounts, *prima facie*, to such a recognition. It was proved here, that if the writ came to the office indorsed, such indorsement was adopted in the office; otherwise, the writ was indorsed in the office. It amounts to the same thing as if the clerk of the under-sheriff, or the under-sheriff himself, had indorsed the writ. If the writ would be evidence, I think the examined copy is evidence also.

(a) 1 Marsh. 554.

BAYLEY, B.—I think it clear that this is *prima facie* evidence, to fix the Sheriff with the acts of the officer, whose name is indorsed upon the process which is returned. It appears to be the course of the office, that the name of an officer is always indorsed on the process, either before it comes to the office, in which case the indorsement is generally adopted, and thereby becomes the act of the Sheriff, or if the process is not indorsed before it is delivered to the Sheriff, the name is there indorsed after it is received. The writ so indorsed is returned and filed; and it cannot be presumed, that any alteration is made after the writ is filed. The Sheriff, therefore, sends out the writ, with an intimation, that the officer whose name is indorsed is the officer by whom it was executed; and there is no hardship upon the Sheriff; because, if the warrant be granted to a different officer, the Sheriff has the means of proving that fact. The case of *Fonsick v. Mugnay* was an action against the late Sheriff, and the Chief Justice “agreed, that if it had been proved, that the defendants, *as Sheriff*, had received the return, it would have been sufficient to shew that *Owen* was their officer.” This clearly shews what would have been the opinion of the Chief Justice upon this point.

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The rest of the Court concurring, the rule was

Refused.

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**BLACKETT v. THE ROYAL EXCHANGE ASSURANCE  
COMPANY.**

In an action on a policy of insurance in the usual form, on ship, boat, &c. evidence of usage that the underwriters never pay for the loss of boats on the outside of the ship, slung upon the quarter, is inadmissible.

On the memorandum, "free from average under 3*l. per cent.*," the underwriter is liable for the amount of the aggregate of several partial losses, each less than 3*l. per cent.*, but amounting together to more.

**COVENANT** on a policy of assurance at and from *London* to *Calcutta*, on the ship *Thames*, her tackle, apparel, ordnance, munition, boat, and other furniture, in the usual form; with the memorandum, "free from average, under 3*l. per cent.*, unless general."

At the trial, before *Vaughan*, B., at the *London* sittings, the plaintiffs having proved the loss of a boat, which, with other damage, subsequently incurred by stress of weather, amounted to more than 3*l. per cent.*, the defendants offered evidence of a usage, that boats, slung upon the outside of the ship, on the quarter, were not protected by the policy. It had been proved, on the part of the plaintiffs, that such slinging was proper and necessary in voyages of the description insured against. The learned Baron was of opinion, that such evidence of usage was inadmissible, and he accordingly rejected it.

The defendants then contended that several partial losses, each in itself less than 3*l. per cent.*, but amounting in the aggregate to more than 3*l. per cent.*, could not be lumped together, so as to take the case out of the exception contained in the memorandum. The learned Baron reserved the point; and the plaintiff had a verdict, with leave for the defendants to move on the rejection of evidence of usage, and on the construction of the memorandum.

In *Michaelmas* Term, the *Attorney-General* obtained a rule accordingly, citing *Pelly v. Royal Exchange Assurance Company* (a), on the first point; and *Stevens on Average* (b), on the last.

(a) Burr. 341.

(b) Page 205.

*Spankie*, Serjt., and *Maule* shewed cause.—The evidence of usage was properly rejected. The words, *boat*, &c., are express unequivocal words, and evidence of usage was clearly inadmissible to contradict their import. *Parkinson v. Collier* (a), 1 *Phill. Evid.* (b). If parol evidence had been received in this case, it would have been received to vary an express unambiguous written contract. It was proved at the trial that the boat was properly slung, and that it would have been improper, if it had not been so slung. Indeed, even if it had been improperly stowed, negligence in that respect, on the part of the master, would have furnished no defence. It would be extremely dangerous to admit, on such a question, evidence of a usage at *Lloyd's*, which only amounts to a usage not to pay, a species of prescription *de non solvendo*.

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*Secondly.* The insurance comprehends the whole voyage. The question is, whether, where the ship arrives at her destination, damaged to an extent more than 3*l.* per cent., the underwriters can inquire whether such damage occurred at one stroke? Upon consideration of this proposition, the question answers itself. In the case of sea damage to a ship or goods, especially enumerated goods, there can hardly be an instance of an average loss, in which there would not be some ground for inquiring at what period the loss occurred. But there are two cases which will be relied upon. In *De Cheminant v. Pearson* (c), it was holden, that the liability of the underwriter was not restricted to the single amount of his subscription, but that he may be subject either to several average losses, or to an average loss and total loss, or to money expended about the defence, &c., of the ship, to a much greater amount than the subscription. It is said, that case shews, that the losses are several and independent; but it will be found

(a) *Park*, *Insur.* 416.

(b) *P.* 539, 6th edit.

(c) 4 *Taunt.* 367.

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not to touch the present question. In the first place, that vessel had been repaired before the total loss, so as to vest the partial loss; but the nature of the policy is, a contract to indemnify for an aliquot proportion of the ship; and therefore it was clear, that the underwriter was liable above the actual sum subscribed. In *Livie v. Janson* (a) the ship was warranted free from *American* condemnation; she was afterwards partially damaged, and subsequently seized by the *American* government and condemned; it was holden, that the seizure took away the right to recover for the partial loss. This case shews, conclusively, the ground upon which the previous case proceeded, *viz.* the intermediate repair; for the assured cannot bring an action against underwriters for a partial loss, pending the voyage, unless the ship be repaired, for she may be lost by a peril not insured against, and then no injury is sustained; and this is the view taken by the author upon whose doubt this rule has in some measure been obtained (b). The foreign writers upon this subject seem to be in favour of the plaintiff; for *Emerigon* (c), *Valin*, and *Pothier*, treat averages and average as identical. On the construction contended for by the other side, the assured might sustain a series of partial losses, amounting to 100*l. per cent.*, without having any remedy; and, on long voyages, as frequently happens, there might be a variety of losses under 3*l. per cent.*, amounting, together, to a very serious proportion of the whole. If a ship arrive, at the end of her voyage, damaged to an amount more than 3*l. per cent.*, the underwriters ought not to be permitted to inquire whether such loss occurred at one period or not. Great inconvenience would arise, if an inquiry of this nature were to be entered into after every long voyage. This point has never been raised by the underwriters until

(a) 12 East, 648.

(b) Steven's Aver. 205.

(c) *Traite des Assurances*, c. 12,  
s. 44.

the present time, though it must frequently have occurred.

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The *Attorney-General, Campbell, and Follett, contra.*—Usage may be resorted to, for the purpose of getting at the meaning of words of this description. The evidence was offered to shew, that the general usage of trade, and particularly at *Lloyd's*, was, that the underwriters did not pay on the loss of boats slung over the quarters. Such an universal usage shewed the understanding of the parties, and what they had in their contemplation. Mercantile contracts are always to be construed according to the meaning in which they are understood by mercantile men. Evidence of usage has been admitted to prove that goods stowed on deck were not within a general policy on goods (a). So, in *Gabay v. Lloyd* (b), evidence of usage was admissible, to explain the ambiguous meaning of the word “mortality,” a warranty against which had been held, in *Lawrence v. Aberdeen* (c), not to extend to a case where animals died in consequence of the agitation of the ship in a storm. It is true, that, in *Gabay v. Lloyd*, the evidence of usage was unsuccessfully offered; but it was admitted, for the purpose of shewing (if it had been strong enough to do so) that the manner in which the animals perished was not such a loss as the policy contemplated, and that the underwriters did not pay such losses.

In the last of the cases on the subject of goods stowed on deck, the question was not as to the propriety of their being stowed there, but whether, being so stowed, they were protected by the policy, in which they were not specifically named. Evidence of usage was admitted to shew,

(a) *Ross v. Thwaite*, London  
Sittings after Hil. T. 16 Geo. 3;  
*Backhouse v. Ripley*, C. P. Sittings  
after Mich. 1802, *cor. Chambre, J.*,

*Park on Insur.* 26.

(b) 3 B. & C. 797; 5 D. & R.  
641.

(c) 5 B. & A. 107.

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that the underwriters must have been aware of the practice of stowing goods of the description in question on deck; and the proof that they were usually stowed on deck, was considered as tantamount to proof that the underwriters were aware of it (a). In *Palmer v. Blackburn* (b), evidence of the usage of settling the loss on a policy on freight, was admitted.

But, *secondly*, several average losses, under 3*l. per cent.*, cannot be clubbed together, so as to make the underwriters liable. *Le Cheminant v. Pearson* (c) is in favour of the defendants. It was there held, that the losses were distinct, and that the underwriters might be liable for a total loss, after having been liable to contribute for the repairs of a partial loss. It would be very hard to hold, that the losses were distinct, so as to charge the underwriters first with a partial, and then with a total loss, if it were also to be held, that, for the purpose of charging the underwriters, losses were to be reckoned joint, and that they might be clubbed together, for the purpose of making the amount above the 3*l. per cent.* Suppose a vessel sustains a loss above 3*l. per cent.*, and that such loss is paid by the underwriters, or is sued for, and that afterwards another loss, under 3*l. per cent.*, is sustained, would that second loss give a new cause of action?

[Lord *Lyndhurst*—That argument would perhaps be met, by saying that no action could properly be brought until the end of the voyage.]

The averages here are quite distinct, as to time, place, and the nature of the loss. The warranty is an answer to each average under 3*l. per cent.*, and the underwriters subscribe the policy on the faith of such warranty.

*Cur. adv. vult.*

(a) *Da Costa v. Edmonds*, 4  
Camp. 142.

(b) 1 Bing. 61.

(c) 4 Taunt. 367.

Lord LYNTHURST, C. B., now delivered the judgment of the Court:—

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There were two questions in this case, one, whether parol evidence of an usage was admissible to shew, that, for boats on the outside of the ship, slung upon the quarter, underwriters never paid; the other, upon the construction of the clause—"free from average under *3l. per cent.*," whether the underwriter is answerable for every instance of damage, however small, if the aggregate *in toto* amount to *3l. per cent.*, or whether each instance, where the damage it occasions can be ascertained and is under *3l. per cent.*, is to be excluded; and we are against the defendants upon both. The policy is in the usual form as to ship and goods, and, as far as regards the ship, imports to be upon the ship (that is, the body), tackle, apparel, ordnance, munition, boat, and other furniture of the ship called the *Thames*. There is no exception, and the policy is, therefore, upon the face of it, upon the *whole* ship, on *all* her furniture, and on *all* her apparel. It was in evidence in the cause, and admitted upon the argument, that, upon such voyages as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung; and that the ship would not be properly furnished or equipped, unless it had a boat in that place, and so slung. The objection, then, to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. That, whereas the policy imported to be upon the ship, furniture, and apparel generally, the usage is to say that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, it is never admissible to contradict what

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is plain. The cases which are collected in 1 *Phillips* (a), and *Starkie upon Evidence* (b), clearly establish this position; and a reference is made to the same subject in the Second Volume of Mr. *Phillips*' book (c). The authority referred to in the argument, as to goods lashed upon the deck, seems to be plainly distinguishable, and to proceed upon a different principle. On an insurance upon goods, the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part; or, if they be goods which ought not to be placed in the ordinary stowage, but in a more perilous situation, he ought to be apprized, either of the nature of the goods, or of the part of the ship in which they are to be put. If he is left to suppose that they are ordinary goods, he will naturally suppose they will be placed where ordinary goods are placed, and that they will incur the hazard only of ordinary goods; and if he were to be made answerable for extraordinary peril, he would be answerable for a peril he had not contemplated, and for which he had not received an adequate compensation. This, as it seems to us, is the true principle upon which evidence of usage is admitted as to goods lashed upon deck. They are not in the part of the ship where goods are usually carried, they are in more than usual peril, and an usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy, is essential to that information which the underwriter ought to receive to enable him to estimate the risque and calculate the premiums, and is a portion of that

(a) Pp. 553 to 559. (b) Pp. 1032 to 1038. (c) Pp. 36, 37.

fairness which ought to be rigidly observed upon all these contracts. The policy is upon goods generally, and the usage explains what description of goods is intended, *viz.* goods of ordinary, not of extraordinary danger. We are, therefore, of opinion that the evidence of usage was properly rejected.

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The next question is, upon the effect of the memorandum "free from average under 3*l.* *per cent.* The memorandum is in the nature of an exception. The policy is general, extending to all losses, the memorandum excepts losses where each or all, according to the construction to be put upon it, are under 3*l.* *per cent.* The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words, and, if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer (*a*). The words here used are ambiguous, capable of excluding every average which *per se* is under 3*l.* *per cent.*, or capable of including every average, however minute, if the aggregate of different averages come up to that amount. Usage might perhaps explain the ambiguity and shew which of the two alternatives was intended; but there was no evidence of usage. *Emerigon* (*b*) speaks of averages in the plural, as if it was sufficient if the aggregate of the averages amounted to 3*l.* *per cent.*; but he does not appear to us to speak upon the subject in such a manner as to justify a conclusion either way upon the point in question, and we are not aware of any other writer of authority that does. In the absence, therefore, of usage and authority, it seems to us that we ought to rest upon the rule of construction we have men-

(*a*) 2 B. & C. 207; 5 B. & C. 847, 850, 851.

(*b*) Cap. 12, s. 44, Subdivision, 4.

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tioned, and according to that rule the defendants are responsible if the aggregate of different averages comes up to 3*l. per cent.* The consequence is, that the rule must be discharged.

Rule discharged.

JAMES, Gent., v. CHILD.

Where the particulars of the plaintiff's demand exceed three folios, the Court will order the plaintiff to deliver to the defendant full particulars of his demand, the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial, even though the defendant has had full particulars of the account before action brought.

**INDEBITATUS** *assumpsit* for conveyancing business. The plaintiff had, in pursuance of the rule, T. T. 1 *Will*, 4 (a), delivered with his declaration a notice that the full particulars of the plaintiff's demand exceeded three folios, and stated generally, that the plaintiff's claim was for the sum of 58*l. 1s. 1½d.* for conveyancing, between the 1st *January*, 1822, and the 1st *January*, 1830. A summons for further particulars, with dates and items, had been attended before a Baron, and an affidavit of the defendant in support thereof had been produced, stating that he had not, to the best of his recollection and belief, received any other account or bill whatsoever, save two accounts annexed (which were general statements of the amount of bills alleged to have been delivered), and that it was necessary for him to have the particulars of the items of such bills for his defence. This was met by a counter affidavit, that particulars of the bills had been delivered four years ago, and that the particulars of the 58*l. 1s. 1½d.* had been for some time delivered to the defendant. The learned Baron declined to make an order.

*Chilton* moved for a rule to shew cause why full particu-

(a) *Ante*, Vol. 1, p. 470.

lars should not be delivered, and contended, that, in all cases, according to the spirit of the new rule, full particulars should be delivered, if required by the defendant, whether he had previously had an account rendered or not, and that the restriction to three folios was intended for the benefit of the defendant, who was not to be put to the expense of a longer particular if he had already a full account in his possession.

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[*Bayley, B.*—It may be that the defendant has had the particulars of the account and mislaid them. At chambers, I have granted such applications as the present, upon the terms of the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial.

*Vaughan, B.*—I have adopted the same course at chambers].

A rule *nisi* was granted upon these terms, and cause having been shewn by *E. V. Williams*, the Court made the rule—

Absolute (a).

(a) Before the late rule H. T. 2 W. 4, s. 47, *ante*, p. 181, it was necessary in the *Exchequer* to have an affidavit that the defendant never

had had particulars, or had mislaid them, or was not sufficiently acquainted with the demand, so as safely to proceed to trial.

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## IN THE EXCHEQUER CHAMBER.

(*In Error from the Court of King's Bench*).

GIBB v. MATHER and Others.

Where a bill of exchange, drawn with the words "pay to my order in *London*," in the body of the bill, and directed to the drawees "payable in *London*," was accepted at Messrs. *J., L., & Co.*, bankers, *London*:—*Held*, that a presentment at *J., L., & Co.*'s, was necessary to charge the drawer; and that the circumstance of the drawee having negotiated it after such acceptance, made no difference.

**ASSUMPSIT** against the plaintiff in error (the defendant below), as drawer of a bill of exchange, payable to his own order "*in London*," and accepted payable at Messrs. *Jones, Lloyd, & Co.*, bankers, *London*, and directed to the drawee, payable in *London*. The presentment to the acceptor was made in *Liverpool*; and, for the purpose of raising the question whether this was a sufficient presentment to charge the drawer (the defendant below), at the trial before *Parke, J.*, at the *Lancaster Lent Assizes*, 1830, a bill of exceptions was tendered.

The plaintiffs (below) were partners together in trade, and holders of a certain bill of exchange, which was as follows:—(that is to say), "*Liverpool, 27th September, 1828*—Four months after date, pay to the order of myself in *London*, 175*l.* 10*s.*—Value received in timber—*Duncan Gibb*.—To Messrs. *Chapman & Fairclough, Liverpool*, payable in *London*;" which bill was accepted as follows:—(that is to say), "Accepted at Messrs. *Jones, Lloyd, & Co.*, bankers, *London*—*Chapman & Fairclough*"—And indorsed as follows:—(that is to say), "*P. pro. Duncan Gibb, John Kempster*." The defendant (below) himself presented the bill for acceptance, and himself received back the bill from the acceptors accepted. The bill was presented at *Liverpool* to the acceptors for payment on the 30th day of *January*, 1829, on which day the bill had accrued due; and the acceptors refused to pay the same; and notice was given on the 30th day of *January*, 1829, by the plaintiffs (below) to the defendant (below), of the presentment of the bill to the

acceptors, and of their refusal to pay the same. The handwriting of the several parties to the bill and the authority of *Kempster* were proved. The learned Judge delivered his opinion to the Jury, that, upon this evidence, the plaintiffs (below) were entitled to a verdict. Upon this direction, the Jury found a verdict for the plaintiffs (below), and a bill of exceptions was tendered and sealed; and judgment having been entered up, a writ of error was brought, which was now argued by—

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*Kelly*, for the plaintiff in error.—The single question in this case is, whether, on a bill whereby, in the body of the bill, the drawee is required to pay to the order of the drawer in *London*, and which bill is, in compliance with such direction of the drawer, accepted by the drawee payable at a particular place in *London*, it be necessary, to charge the *drawer*, to prove a presentment in *London*. That question depends on two propositions. It is submitted on the part of the plaintiff in error—*first*, that, before the late statute, 1 & 2 Geo. 4, c. 78, it would have been necessary on a bill so drawn, to shew a presentment in *London*—and, *secondly*, that the statute does not affect *drawers*.

Before the case of *Rowe v. Young* (a), considerable difficulties prevailed as to the effect of acceptances at a particular place. It was held by the Court of *Common Pleas*, that, even to charge an acceptor, it was necessary to shew a presentment at the place. The Court of *King's Bench*, on the other hand, in several cases held that such acceptances were general, and that the acceptor was liable as on a duty to pay everywhere. In the case of *Rowe v. Young*, the House of Lords upheld the opinion of the *Common Pleas*. But, whatever difference had prevailed on this subject, no difference or difficulty existed where the bill in its body contained a direction to the acceptor to make his acceptance payable at a particular place. *Saunderson v. Bowes* (b),

(a), 2 Brod. & Bing. 165.

(b) 14 East, 500.

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*Roche v. Campbell* (a), and many other cases, clearly establish the principle that the naming the place in the body of the instrument makes the place material as affecting the rights of the particular parties. *Saunderson v. Bowes* was an action against the maker; and *Roche v. Campbell* was against the indorsee of a promissory note; and the principle of these decisions applies still more strongly to the case of the drawer of a bill, who is only liable on the default of the acceptor in paying the bill, when a proper presentment is made at the place named. It appears, therefore, that, whatever difference existed between the two Courts, as to the necessity of a presentment at a particular place on a special acceptance, there was no doubt as to the necessity of a presentment at the place named in the body of a bill or note. The difficulty was, as to charging the acceptor; there was none as to the drawer: and the consideration of this being the state of the law before the passing of the statute 1 & 2 Geo. 4, c. 78, is material towards the proper understanding of the object of that statute.

In the recitals of the statute, as well as in the enacting part, no mention whatever is made of the drawer. The acceptor alone is referred to, and the statute gives to the acceptor the power of limiting his responsibility, so as to relieve himself from the inconveniences referred to in the opinions of the Judges in *Rowe v. Young*.

The statute recites the inconveniencies of *acceptors* only; and it does not at all affect drawers, who are not even mentioned in it, and about whom no difference of opinion had previously existed. It may fairly be contended, therefore, that the statute did not contemplate the case of a drawer, to whom no power is given by the statute to protect himself and limit his liability, and who can only do so by expressing such restriction in drawing the bill. He had this power before the statute, and he retains it not-

(a) 3 Campb. 248; and see *Hodge v. Fillis*, 3 Campb. 462.

withstanding the statute. A drawer who passes a bill of this description, promises, in effect, that he will pay it, if the drawee do not pay on a presentment at a particular place and time, and due diligence be used and notice given. An acceptor, then, cannot surely be allowed to enlarge the extent of the drawer's liability by his acceptance, which would be the effect of holding that the drawer in this case was liable, without a presentment in *London*. The drawer may have drawn in this form, because he knew that the drawee had funds in *London*. He may be aware that the drawee has money in a *London* banker's hands, and his liability would be very considerably increased, if he were liable on a presentment at any other place.

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In this particular case, it is stated, that the bill was accepted before it passed out of the hands of the defendant (below), the drawer, and it will perhaps be contended, that his knowledge of the mode in which it was accepted will make him liable on the presentment in question. The case, however, must be decided by the general rule to be adopted in construing instruments of this nature. It may be said, that some recent decisions (*a*) have established that such a presentment as the present is good as against the acceptor, but there is no authority whatever to shew that it is good as against a drawer.

In the case of *Rowe v. Young*, Mr. Justice *Bayley* said (*b*)—"The effect of such an acceptance is this: that, to entitle the holder to sue the drawer or indorser, it casts an obligation upon him to present the bill at Sir *John Perring & Co.*'s for payment, but that, as against the acceptor himself, the holder is not bound so to present it." The majority of the Judges held, in that case, that the acceptor was not liable without such a presentment; but it was considered as clear, that the drawer was not liable under

(*a*) *Selby v. Eden*, 3 Bing. 611; *Fayle v. Bird*, 6 B. & C. 531.

(*b*) 2 Brod. & Bing. 231.

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the circumstances. Here, the contract of the drawer appears on the bill, and the bill only, and cannot be altered by the acceptance. The presentment is a condition precedent, and must be shewn. As against the acceptor, the necessity of a presentment at the particular place is taken away by the statute, but, as to the drawer, the law remains unaltered.

*Roscoe, contra.*—This being a general acceptance, by the operation of the statute 1 & 2 Geo. 4, c. 78, the drawer is not discharged by the want of a presentment in *London*. The liability of the drawer is, to pay the bill, if, in case of a proper presentment to the drawee or acceptor, he neglects to pay it. The question, therefore, in this case is, whether there has been a proper presentment. If the bill did not require a presentment in *London*, in order to charge the acceptor, it did not require a presentment in *London*, in order to charge the drawer. Where the acceptance is special, the presentment must be at the place indicated, to charge either the acceptor or the drawer; where it is general, no presentment is necessary, as against the acceptor; and, as against the drawer, a presentment to the acceptor any where is good. But, according to the argument for the plaintiff in error, this acceptance is both special and general; special, as it regards the drawer; general, as it regards the acceptor. There is no authority for such a distinction as this. That this acceptance is general, appears from the cases of *Selby v. Eden* (a), and *Fayle v. Bird* (b).

[*Tindal, C. J.*—In *Fayle v. Bird*, Lord *Tenterden* observed, that, but for the case of *Selby v. Eden*, he should have entertained some doubt if the case was within the provisions of the statute.]

But it is said that the request to pay is conditional in

(a) 3 Bing. 611.

(b) 6 B. & C. 531.

the body of the bill, which requires the acceptor to pay in *London*. The condition of the bill is complied with by the acceptance as it stands, though it should be held to be a general acceptance; for, the effect of it, in law, is, that the bill may be presented for payment either in *London* or to the acceptor personally.

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It is frequently matter of convenience that the holder of a bill should be able to receive payment in *London*, which is the reason for inserting the condition in the bill; but that object is equally attained, though he may, at the same time, have the additional power of presenting it personally to the acceptor. The drawee, by accepting the bill in this manner, complies with the request of the drawer, and, at the same time, incurs an additional liability, which is not injurious to the drawer.

But, supposing the bill to be such as to require the drawee to accept it payable in *London* only, and not to accept it so as to make a presentment in any other place sufficient, two questions arise—*first*, whether the drawee has complied with that request—and, *secondly*, supposing that he has not done so, whether the drawer is discharged. In order to make this a special acceptance, so as to render a presentment in *London*, and there only, necessary, the drawee ought to have complied with the requisitions of the stat. 1 & 2 *Geo.* 4, c. 78, which requires the addition of the words “only, and not otherwise or elsewhere.” Having neglected to insert these words, the acceptance is general.

[*Bayley, B.*—Suppose a bill drawn—“Pay to my order, at No. 32, *Cornhill, London*,” and accepted generally?]

In such case, a presentment to the acceptor any where would be good. The holder ought to require him to accept it in the terms of the stat. 1 & 2 *Geo.* 4, c. 78, payable at 32, *Cornhill* only, and not otherwise or elsewhere, and, on refusal, might resort to the drawer. In this case, the holder

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chose to take a general acceptance, varying from the terms of the bill (supposing the argument on the other side to be correct, that the bill requires a payment in *London* only); and the next question is, whether, by such an acceptance, and a presentment in pursuance of it, the drawer is discharged.

There are many cases in which, notwithstanding a variation in the acceptance from the terms of the bill, the drawer has been held liable on a presentment according to the acceptance.

[Lord *Lyndhurst*.—I agree you may vary by restricting, but not by extending the liability.]

The question, whether a variation in the acceptance, with regard to the place of payment, discharges the drawer, was put by the Judges in the case of *Rowe v. Young*, and it was the opinion of several of their Lordships, that such variation will not discharge the drawer, unless he is injured by it. Now, in this case, it appears, that the drawer could not have been injured; for, upon the bill of exceptions, it will be seen that the acceptance was made while the bill was in the hands of the drawer. He cannot, therefore, now say that he was injured by a variation of which he approved.

There is nothing in the statute 1 & 2 *Geo. 4*, c. 78, to shew that it was not intended to apply to the drawer as well as the acceptor; nor could the statute affect the liability of the latter, without also affecting that of the former.

It was unnecessary to provide specifically for the case of the drawer, since his liability depends upon that of the acceptor. The words of the statute are very general, and enact, that an acceptance like the present shall be taken to be a general acceptance, “to all intents and purposes.”

*Kelly* replied.

*Cur. adv. vult.*

The judgment of the Court was now delivered by TINDAL, C. J. Exch. Chamber,  
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This was an action by the indorsees against the drawer of a bill of exchange after non-payment by the acceptors. Upon the trial of the cause, it appeared upon production of the bill that the drawer, in the body of the bill, required the drawee to pay to the order of himself "*in London*," the sum mentioned therein; that the bill was addressed to Messrs. *Chapman & Fairclough, Liverpool*, with the additional words "*payable in London*," and that it was by them accepted "*at Messrs. Jones, Lloyd, & Co., bankers, London*." It appeared further, that, upon the day the bill became due, it was presented for payment to the acceptors at *Liverpool*, who refused payment, and that due notice of such refusal was given to the defendant. The learned Judge who tried the cause directed the Jury that the evidence above stated was sufficient to entitle the plaintiffs to recover, and the Jury found their verdict for the plaintiffs below. The propriety of this direction now comes before us, upon a bill of exceptions tendered by the defendant below; and the question raised for our consideration is this—whether, in an action against the drawer of the bill above set forth, on the ground of non-payment by the acceptors, it is or is not necessary to prove a presentment for payment at the banking-house in *London*, where the same is made specially payable by the acceptance. And we are all of opinion that such special presentment is necessary, in order to enable the holder to recover against the drawer of the bill.

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Before the passing of the statute 1 & 2 Geo. 4, c. 78, it was a subject of considerable doubt in the Courts of law, whether, in the case of a bill drawn generally, but accepted payable specially at a particular place, an action could be maintained against the *acceptor*, without averring in the declaration, and proving at the trial, a presentment for payment at the place where the drawee had, by his accept-

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ance made the bill payable. Upon that point, the Court of *Common Pleas* had held a presentment of the bill at the place named in the acceptance to be necessary, on the ground that it was a qualified acceptance only; the Court of *King's Bench*, on the contrary, had held it was unnecessary to make any such presentment, on the ground that the acceptance was a general acceptance, with a mere intimation of a place of payment, if the holder thought proper to apply there. The conflicting opinions of the two Courts upon that point were set at rest before the framing of the statute, by the judgment of the House of Lords in the case of *Rowe v. Young* (a), by which judgment the opinion held by the Court of *Common Pleas* was decided to be the law of the land. But the doubt which had been formed was confined to the case where the question arose between the holder and the acceptor. In cases between the indorsee and the drawer upon a special acceptance by the drawee, no doubt appears to have existed, but that a presentment at the place specially designated in the acceptance was necessary, in order to make the drawer liable upon the dishonor of the bill by the acceptor. Still less did the doubt ever extend to cases where the drawer directed, by the body of the bill, that the money should be payable at a particular place; in such a case, all the Courts at *Westminster* agreed that the presentment must be made at the place specially designated in the bill itself. This had been decided in the Court of *King's Bench*, in the case of a banker's promissory note which was made payable at a certain place named in the body of the note (b). The same doctrine was also laid down in the case of *Roche v. Campbell* (c), where the action was brought by the indorsee of the note against the indorser. Now, no distinction as to this point can be taken between the drawer of a bill of ex-

(a) 2 Brod. & Bing. Rep. 165. East, 500.

(b) See *Saunderson v. Bowes*, 14 (c) 3 Campb. 247.

change and the indorser of a promissory note. As to their liability to the holder, they stand precisely in the same situation. It is the acceptor of the bill and the maker of the note who are primarily liable to the holder; and the drawer of the bill, like the indorser of the note, does not become liable until there has been a due presentment made to the party liable in the first instance to pay the bill. The law, therefore, which applies to the indorser of the note, will also govern the case of the drawer of a bill. Such, then, being the state of the drawer's liability at the time the statute was passed, it must still remain the same, unless the statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptors alone. The title of the act is, An Act to regulate acceptances of bills of exchange; and—after reciting that it has been adjudged, that, where a bill is accepted payable at a banker's, the acceptance thereof is not a general, but a qualified acceptance; but that a general practice and understanding had prevailed amongst merchants, that such acceptance was a general acceptance—it proceeds to enact, that, after the passing of that act, such an acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill, unless the acceptance is restricted to payment at the particular place, by the words and in the manner directed in the act. The very reference in the statute to the adjudication by law, imports that the Legislature intended the statute to apply to those cases only in which doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of passing the act. Again, the enactment comprehends in terms the cases of acceptors, and acceptors only, and is silent altogether upon the subject of the liability of drawers and indorsers. It foresees the inconvenience which is cast

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upon acceptors by the enactment that an acceptance of a bill payable at a particular house, shall thenceforth be considered as a general acceptance; and it gives the acceptor the power of protecting himself against such inconvenience, by the use of restrictive words in his acceptance. But the inconvenience is as great to the drawer as to the acceptor. If the drawer has directed his money to be paid at a particular place, and, after an acceptance made payable at that place, the bill should be returned to him dishonoured without a presentment at the house where it is made payable, it is as great a hardship upon him as the act had contemplated and provided for in the case of the acceptor. If, then, the statute had intended the enactment to apply to the case of the drawer, we cannot but think the same protection would have been given to the drawer, which had been given in terms to the acceptor of the bill.

One argument advanced on the part of the defendant in error is, that the acceptor has varied his acceptance from the original terms in which the bill was drawn; and, as the drawer has been contented to take back the bill with such varied acceptance, it must now be considered as a general acceptance, under the operation of the late statute. But the answer to this argument seems to be, that the direction contained in the body of the bill is not altered or varied by the terms of the acceptance any further than was necessary for the benefit of the drawer and of all subsequent parties. The drawer directed the drawee to pay the money in *London*, the drawee accepts, specifying the particular house in *London* at which he intends to pay the bill; without such specification, the acceptance might be useless, from its generality; and the form of the bill implies, that the drawer expected and intended the drawee to make it payable in *London*.

We therefore think, that, as no presentment was made at the house of the bankers in *London*, where the acceptor had undertaken to pay it, the liability of the drawer never

arose, and consequently, that the judgment which has been given for the plaintiff below, must be reversed.

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Judgment reversed.

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TRAFFORD and Others v. The KING, on the Prosecution  
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[*In Error, from the Court of King's Bench.*]

**INDICTMENT** for a nuisance. The first count of the indictment stated, that, after the passing of a certain act of Parliament, passed in the second year of the reign of his late Majesty, King *George the Third*, to enable the most noble *Francis*, Duke of *Bridgewater*, to make a navigable cut, or canal, from *Longford Bridge*, in the township of *Stretford*, in the county-palatine of *Lancaster*, to the river *Mersey*, at a place called the *Hempstones*, in the township of *Halton*, in the county of *Chester*, and within the times in the said act in that behalf limited, to wit, in the year of our Lord, 1763, a cut, or canal, from *Longford*

A proprietor of land adjoining a river has a right to raise the banks, from time to time, as occasion may require, upon his own land, so as to confine the flood water within the banks, and to prevent it from overflowing his land, with this single restriction, that he does not thereby occasion an

injury to the lands and property of other persons; and if, being in the actual exercise of this right, an aqueduct and embankment be built lower down the river, it will be subject to the enjoyment of such rights as the landholder possessed at the time when it was constructed.

If an aqueduct be built, so as, in times of flood, to pen back the water of a river, and cause it to overflow the lands of the adjoining proprietors, they may raise fenders to protect their lands, even though the water of the river be thereby forced against and endanger the aqueduct, unless, by the construction or raising of the fenders, the proprietors impede what was, before the erection of the aqueduct, the ancient and accustomed course for the escape of the water in times of flood.

Where, therefore, upon an indictment against the proprietors of land adjoining a public navigation, for a nuisance in erecting and continuing fenders on the banks of a river, whereby the water of the river was forced against the sides and aqueduct of the canal, it appeared that the canal was carried across the river and adjoining valley by means of an aqueduct and embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that, in times of flood, the water, which was penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, through the arches in the embankment to the river, doing much damage to the lands over which it passed; that the aqueduct was sufficient for the passage of the water at all times, except in times of high flood; and that, on either side of the river and brook, there were fenders to prevent the waters from overflowing the lands adjoining, which fenders had been raised from time to time, as occasion required: but it did not appear whether the raising of the fenders was, or was not, an accustomed usage before the construction of the canal; nor what was the ancient course of the water in times of flood; nor whether the raising of the fenders was, or was not, necessary, in consequence of the construction of the canal:—*Held*, that no judgment could be given.

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*Bridge* aforesaid, to the river *Mersey* aforesaid, was made in pursuance of the said act, and from thence, until and at the time of the taking of the inquisition, had been continued and used, and still was continued and used, to wit, in the county of *Lancaster* aforesaid; and that, during all that time, all the liege subjects of our said lord the King had used and navigated upon the said cut, or canal, with boats and other vessels, not exceeding thirty tons burthen, at their free will and pleasure, upon payment of certain reasonable rates, or duties, in that behalf legally demanded, and still did use and navigate upon the same canal, in manner aforesaid, to wit, in the county aforesaid. And that the said cut, or canal, from the time of the making thereof as aforesaid, until the taking of the inquisition, by means of an aqueduct, made in pursuance of the powers and provisions of the said act, had passed over, and still passes over, the river *Mersey* aforesaid, in the course of the said river to and towards the said place called the *Hempstones*, at a place in the said county of *Lancaster* near to the point of junction of the said river and a certain brook, or water-course, in the county of *Lancaster*, called *Chorlton Brook*; and that the defendants, on the 1st day of *January*, in the year of our Lord 1770, and on divers other days and times between that day and the day of taking this inquisition, with force and arms &c., to wit &c., unlawfully, wilfully, and injuriously, did erect, raise, and place divers mounds and embankments, to wit &c., of great width, length, and heighth, to wit &c., near to the ancient banks of the said river *Mersey*, and the said water-course or brook, called *Chorlton Brook*, respectively; that is to say, in parts thereof, respectively, near to the said aqueduct, to wit, at &c.; and the said mounds and embankments so then erected, raised, and placed, from the time of the erecting, raising, and placing the same, until the taking of the inquisition, severally did wrongfully, unlawfully, and injuriously keep and continue,

and cause to be kept and continued, and still kept and continued, to wit, at &c. Whereby divers large quantities of water, on &c., and on divers other days and times, &c., had been, and still were, wrongfully and injuriously forced and made to flow and lodge unto, upon, and against the said aqueduct, and the sides and foundations of the said canal, adjacent to the said aqueduct, which, on the several occasions aforesaid, ought to have flowed and escaped, and, but for the mounds and embankments aforesaid, would have flowed and escaped by other ways, that is to say, over parts of the banks of the said river *Mersey* and the said water-course, respectively, to wit, at &c. Whereby the said aqueduct, and the sides and foundations thereof, and of the said canal adjoining to the said aqueduct, respectively, had been injured, and had been, and then were, placed in imminent danger of being broken down and destroyed, to wit, at &c., to the great damage of the said aqueduct and canal, to the great terror, imminent danger, damage, and common nuisance of the liege subjects of this realm, using and navigating upon the said canal, with their boats and other vessels, as aforesaid, and of the inhabitants and occupiers of the lands adjacent to the said aqueduct, to the evil example &c.

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There were other counts, varying the charge. Some counts charged the defendants with *severally* raising and erecting the mounds, &c., and wrongfully continuing mounds, &c., theretofore injuriously erected; and one count stated the injury to be done by confining the water, and causing it to break down the banks of the river, and damage the adjacent lands, as well as the aqueduct and canal. Plea—Not guilty.

At the trial, before *Littledale, J.*, at the Summer Assizes for the county of *Lancaster*, 1829, the Jury acquitted some of the defendants; and, as to others, found the following special verdict:—

In 1763, the navigable canal mentioned in the indict-

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ment was made from *Longford Bridge*, in the township of *Stretford*, to the river *Mersey*, at a place called the *Hempstones*, in the township of *Halton*, in pursuance of an act of Parliament, 2 *Geo. 3*, c. 11; and all the liege subjects of our lord the King, since the making of the within-mentioned canal, have navigated, and still do navigate, the same with boats not exceeding thirty tons burthen, at their free will and pleasure, paying therefore the rates and duties by law established. The canal extends, in a direction from north to south, for half a mile and upwards, across a vale in the township of *Stretford*, through which vale the river *Mersey* runs; and the canal is upon the same level throughout, and is raised by artificial embankments on each side thereof, throughout the whole of the said half mile and upwards, and is carried across the river by means of an aqueduct of one arch, which was built at the time of making the canal, and the capacity of which is 792 feet, namely 642 feet above the water, and 150 feet below the water. At the distance of about 430 yards from the river, towards the north, the canal is supported upon three arches passing under it, which three arches were built at the time of the making of the canal, and the capacity of which is 1,507 feet, namely, 583 feet above the water, 924 feet below the water; and, at the distance of about 160 yards from the river, towards the south, a culvert passes under the canal, which was built at the time of the making of the canal, and the capacity of which is 35 feet; and at the further distance of about 300 yards from the said culvert, towards the south, another culvert passes under the canal, which was built by the trustees of the late Duke of *Bridgewater*, the proprietors of the canal, in the year 1806, the capacity of which is 69 feet. Before, and at the time of the making of the canal, there was a ford across the river, at the spot where the aqueduct was built and is now situate; which ford was used by the occupier of the adjoining lands in carting hay from one side of the river to

the other, and passed in a slanting direction from south-east to north-west, by a gradual descent to the water on one side, and a gradual rise on the opposite side. The river flows for several miles in a northerly direction, to a point at which it is joined by a brook, called *Chorlton Brook*, flowing into the river in a direction from east to west, the capacity of which brook, at its junction with the river, is equal to one-tenth of the capacity of the river at the same junction; and, immediately upon the junction of the brook, the river makes a bend, and flows in a westerly direction, for the distance of about 800 yards, until it arrives at the aqueduct; and, after passing under the same, flows in a westerly direction, under a bridge in the turnpike road from *Manchester* to *Altringham*.

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On each side of the river, and also of the brook, there now are artificial banks, called fenders, made for the purpose of preventing the flowing down of the river and the brook, in times of flood, from overflowing the lands respectively adjoining the same; and the said fenders have, from time to time, been raised, as occasion has required, by the proprietors and occupiers of the adjoining lands; and the fenders on the banks of the river, on the north side thereof, now are three feet higher than they were twenty years ago; and the fenders on the banks of the brook, on the north side thereof, now are two feet three inches higher than they were twenty years ago. Near to the point of the junction of the river with the brook, a natural ridge of high land runs in a north-easterly direction, from the river towards a pool, called *Sally's Hole*, and within two hundred yards of the said pool; and the high lands on the other side of the said pool reach to within twenty yards of the said pool, leaving a space of two hundred and twenty yards of low land between the said two ridges of high land; the natural fall of the lands adjoining the north banks of the river, after its junction with the brook, and to the westward of the said natural ridge of

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high land, is towards the said three arches under the canal; and the natural fall of the lands, west of the said low land, adjoining the said pool, is towards the said three arches; and that the natural fall of the lands, east of the said low land, adjoining to the said pool, is towards the brook; and the said low land adjoining to the said pool is eight inches and one quarter of an inch higher than the land immediately adjoining and under the north bank of the brook. Before the banks of the river and of the brook were raised, as above mentioned, the water of the river, in times of flood, was frequently penned back up the brook, flowed over the north bank of the brook, and inundated the lands between the brook and the low land adjoining to the said pool, called *Sally's Hole*, and continuing to rise, flowed over the low land adjoining to the said pool, and so made its way, passing by a place called *Turn Moss House*, to the three arches above mentioned, and after passing through the same, flowed along a low tract of land, until it fell into the river again, at a place called *Erinston*, at the distance of two miles from the said three arches, inundating in its course, both above and below the said three arches, many hundred acres of land, and doing much mischief; and the lands between the said pool, called *Sally's Hole*, and the said three arches were at that time, and still are, intersected with common hedges and ditches; which the flood-water threw down from time to time; but no regular watercourse was ever kept open for the said flood-water. Since the banks of the river and of the brook have been raised, as above-mentioned, the flood-water, whenever the same has flowed over, or has broken down the banks of the brook, has taken the same course, flowing by the said pool, called *Sally's Hole*, past the said place, called *Turn Moss House*, to the said three arches; and the whole of the said three arches are not necessary for any other purpose than for the passage of such flood-water; but one arch of small dimensions would be sufficient to pass all

the drainage and other water, except flood-water, from time to time collected at the spot where the said three arches are. Since the making of the canal, the water of the river has, at different times, flowed over the banks, much higher up the river than the point of its junction with the brook, and has inundated a tract of land, called *Sale Eye*, by the river on the east and north, and by the canal on the west; and by reason of the enbankment, on which the canal is raised, and of the want of sufficient outlets under the same, the said flood-water has been penned up on the said land, called *Sale Eye*, and has, in some instances, and particularly in the year of our Lord 1806, broken down the south bank of the river, between the aqueduct and the brook, and has passed into and across the river, and has broken down the north bank of the same, and after inundating the adjoining lands has flowed down to the said three arches. In the year 1806, complaints were made to the commissioners, acting under the act of Parliament, by the owners and occupiers of lands on the north side of the river, of the damages occasioned to their lands by the flood-water so coming over from the said tract of land, called *Sale Eye*, and of the insufficiency of the outlets, under the embankment of the canal, on the south side of the river. And the trustees of the said Duke of *Bridgewater*, the proprietors of the canal, made compensation at that time to the said owners and occupiers of land, for the damages so sustained; and have also since that time paid an annual rent or compensation to the owner of one field, part of the said land, called *Sale Eye*, in respect of a portion of that field, immediately adjoining the river on the south side, which was on that occasion washed away. And the trustees of the said Duke of *Bridgewater*, the proprietors of the canal, have from time to time repaired the south bank of the river, and the fender thereon, to the extent of fifty yards eastward from the canal.

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The special verdict then described the particular fields belonging to the defendants (below); and it appeared that every fender was much higher than the land to the south of it; and that the fenders on the banks of the river and brook had been raised from time to time within the last six years, and had been kept and continued so raised by the defendants severally in their respective occupations, but not jointly. It also described the levels of the land through which the flood-water was accustomed to escape in the direction of the three arches as first above mentioned, and, also, the level of the bed of the river for some miles above its junction with the brook. A statement was then given of injuries sustained in *July*, 1828, when the flood-water broke the banks of the river and canal, the navigation of which was stopped, and ultimately flowed down to the three arches above mentioned. It then proceeded as follows:—The improved drainage of the country higher up the river for many miles, has occasioned a greater quantity of water to flow down the river to the aqueduct than used to flow down the same river to the said aqueduct for several years immediately after the same was built; but the aqueduct is still of sufficient capacity for the passage of the waters of the river at all times, except in times of high floods. The raising of the fenders on the banks of the river and of the brook has occasioned a much greater quantity of water in times of high floods to flow to and against the aqueduct than did or could flow to and against the same for several years immediately after the aqueduct was built, and has rendered the aqueduct insufficient for the passage of the waters of the river in times of high floods, and has thereby greatly endangered the safety of the canal. If the fenders on the banks of the river and of the brook were reduced to the height at which they were twenty years ago, a great part of the waters of the river and the brook, in times of high floods, would overflow the banks of the brook, and would inundate the neighbouring lands, and would flow in

the direction in which it used formerly to flow by the said pool, called *Sally's Hole*, passing the said place called *Turn Moss House*, to the said three arches, and so to the river at the said place, called *Erinston*, but many hundred acres of land would be thereby inundated, and great injury would be sustained by the owners and occupiers of that land; and the fenders on the banks of the river and of the brook have not been raised more than is necessary to protect and prevent the said lands from being so inundated.

The Court of *King's Bench* gave judgment for the Crown (a). A writ of error was brought, the plaintiffs in error contending that the indictment and special verdict did not shew that the plaintiffs in error were guilty of any indictable offence; that it appeared from the special verdict that the grievances and damages were occasioned by the omission of the canal proprietors to make sufficient outlets for the passage of the water; and that it did not appear from the special verdict that the water of the river and water-course or brook ought to have run or escaped over the banks of the river and water-course. On the other hand, the defendant in error insisted, that, after the canal had been made, and the aqueduct built, by virtue of the act of Parliament for that purpose, the owners and occupiers of lands adjoining the river *Mersey* and the *Chorlton Brook* had no right to make new fenders or embankments, or to raise or extend the old ones, so as to confine the waters of the said river and brook, and cause them to be raised to such a height that they would damage and endanger the aqueduct and canal, and render the aqueduct insufficient for the passage of the water; and that the plaintiffs in error, who had made or continued such new fenders and embankments, and raised and enlarged, or continued the old ones to the damage of the canal, were liable to be indicted for a nuisance.

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The case was argued upon the facts by *F. Pollock* for the plaintiffs in error; and *Wightman* for the defendant in error.

The Court took time to consider, and now—

TINDAL, C. J., delivered the judgment of the Court as follows:—

Upon this special verdict, in which judgment has been given for the Crown by the Court of *King's Bench*, such judgment appears to have proceeded expressly on the principle, that the ancient course and outlet of the flood-water had been obstructed by the wrongful raising, from time to time, of the fenders therein described by the defendants below. Whilst, however, we agree in the principle so laid down by the Court, we are unable to discover, upon this special verdict, a finding of sufficient facts to warrant its application to the present case.

In order to shew the defendants to have been guilty of the offence charged in this indictment, we think, in the *first* place, it ought to appear distinctly upon the special verdict, that the raising and heightening of the fenders on the lands of the respective defendants was not an accustomed and rightful usage, which has obtained from time to time; that it was an enjoyment commencing since the construction of the canal in 1763, not sanctioned by ancient usage, or by the ordinary right which every man possesses, *prima facie*, to protect his own property, provided he can do it without injury to others. And that it ought also to appear distinctly, that the course which the flood-water is stated in the special verdict to have taken, and by which it was carried again into the river at a lower point, was the ancient and rightful course which it ought to take.

And we think, in the *second* place, it ought not to be

left in doubt, upon the facts found in the verdict, whether the raising the fenders to their present height has or has not become necessary, in consequence of the construction of the aqueduct and embankment. On the contrary, that it ought to appear distinctly upon the finding by the Jury, either that the embankment and the aqueduct have not wrongfully turned back more water upon the low lands of the defendants than was formerly collected in times of flood; or that the banks of the river and brook have been raised without any necessity, and not in self-defence against the consequences of the construction of the embankment and aqueduct; or, at all events, that the banks have been raised by the defendants to an unreasonable and unnecessary height; and if these facts are left in doubt upon the special verdict, we think no judgment can be given against the defendants.

Upon the point firstly above suggested, there appears no doubt but that, at common law, the landholder would have the right to raise the banks of the river and brook, from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands, with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons; and if this right had actually been exercised and enjoyed by them before the passing of the acts, then the construction of the aqueduct and embankment may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the act, unless so far as the acts of Parliament may have restrained the exercise of such rights. It appears, therefore, to us to be indispensable, in order to determine whether the acts of the defendants stated in the indictment are wrongful or not, that the Jury should find such facts as will enable us to say with certainty, whether, before the

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making of the canal and the embankment, there was any exercise by the landholders of the right of raising and heightening the banks, from time to time, as occasion required, so as to confine the water at all times to the ordinary channel, and prevent it in times of flood from overflowing the banks; or whether the passage over the banks in times of flood was the usual and ordinary course.

But the present special verdict leaves the commencement of the enjoyment of the right in complete uncertainty. It states only, that there "now are," on each side of the river and brook, artificial banks called fenders, which have from time to time been raised as occasion has required. It finds, indeed, in one part, that these banks are not raised higher than is necessary, a fact very strongly in favour of the defendants. But it gives no date whatever to the origin of these acts of enjoyment on the part of the owners of land adjacent to the river. Upon such a finding, we do not feel ourselves competent to say whether the acts complained of in the indictment amount to a nuisance or not.

Again, the Jury find, that before the banks of the river and brook were raised, the water of the river and brook was frequently penned back, and flowed over the north banks by a track or course, which is described in the verdict, and which is stated to fall into the river again at a place called *Erinston*, about two miles below the three arches. But it nowhere appears whether the flood-water was carried in that course *before* the aqueduct was made, nor whether it had been so carried, for such a period of years, over the lands of different persons, as to constitute a right of water-course in time of flood, in the direction described by the special verdict. But, in order to establish the charge against the defendants, it is essential to shew that, by their raising and heightening the banks of the river and brook, they prevented the water in time of flood from flowing in

this particular course. We ought, therefore, to see, upon the face of the verdict, that there was an existing right of this course for the flood-water over the lands described in the verdict, before we hold the defendants guilty of the offence charged.

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Again, upon the second ground above suggested, we think this special verdict deficient. The special verdict leaves it questionable whether the nuisance complained of, *i. e.* the danger to the aqueduct and the canal, is not attributable in some degree at least, if not entirely, to the act of the owners of the canal. The special verdict states in terms that, since the making of the canal, the water of the river has at different times flowed over the banks much higher up the within-mentioned river than the point of its junction with the brook, and then proceeds to state an instance of damage done in 1806, for which the commissioners named in the acts of Parliament awarded compensation, on account of the insufficiency of the outlets under the canal embankments. Again, on the statement made of the level of the river above the aqueduct, and of the fall immediately below, an inference at least is afforded that the embankment and the canal have contributed to the penning back the waters, thus creating a necessity and justifiable ground for raising and heightening the banks. Without, however, in any manner asserting that such has been the case, or that such is the necessary inference from the facts stated, we only observe, that this special verdict does not state, with sufficient certainty, what is the real cause of the penning back of the water in time of flood; nor whether the raising and heightening of the banks by the defendants had a legal and justifiable commencement; nor what is the rightful course of the flood-water: nor, generally, does it lay before us such facts as will enable us to say whether the acts done by the defendants are lawful or not; or to give any judgment, satisfactorily to ourselves, that should bind the rights of the contending parties.

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Under these circumstances, the only course we can pursue is to reverse the judgment which has been given for the Crown, and to award a *venire de novo*; and if another special verdict should be found, we think it would be desirable that it should contain an express finding of the Jury upon the several points to which we have above adverted, rather than the statement of facts from which the finding of the Jury is only to be inferred.

*Venire de novo* awarded.

Exch. of Pleas.

NEALE v. SWIND.

Where one part of a document has been lost, the Court will compel the party holding the other part, or his attorney if he holds it, to produce it at the Stamp Office, for the purpose of having it stamped, though it is not held on any trust for the party applying.

**ROTCH** moved to rescind part of a Baron's order, which directed the defendant's attorney to produce at the Stamp Office, for the purpose of being stamped, an instrument, (either a lease or an agreement for a lease). There had been two parts of the instrument executed, but the plaintiff had lost his part. *Rotch* contended, that there having been two parts, this did not fall within the class of cases (a) where the Courts have ordered an inspection, the defendant holding it as his own instrument, and not under any trust or duty to produce it. He contended also, that it was confidentially in the hands of the attorney.

**BAYLEY, B.**—It is not confidential; we should enforce it from the party himself. The instrument must be produced at the Stamp Office to be stamped. It is essential to the purposes of justice, for the production of this docu-

(a) *Street v. Brown*, 6 Taunt. 523; and *Lord Portmore v. Goring*, 4 Bing. 152; 12 Moore, 363. 302, 1 Marsh. 610; *Ratcliffe v. Pleasby*, 3 Bing. 148, 10 Moore,

ment unstamped, at the trial, would exclude all other evidence. The party does not want to see the instrument, but he wants it to be put into such a condition, as that, when produced at the trial, if he has given notice to produce it, he may not be nonsuited by its production.

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VAUGHAN, B.—Where only one part of an instrument exists, a party has no right to an inspection and copy, unless the person who has it in his hands holds it for the benefit of both, or can be considered as a trustee for the party seeking the copy; but where the instrument is not properly stamped, the Court will give every assistance to enforce the production, for the purpose of having the instrument stamped. Here the application is not for a copy or inspection, but merely that it should be produced at the Stamp Office, to be stamped, which must be done at the expense of the party who applies.

Rule refused.

### THE ATTORNEY-GENERAL v. PARSONS.

*Revenue.*

UPON an information for intrusion into the royal forest of *Alice Holt* and *Woolmer*, in the county of *Southampton*, and taking and killing hares, pheasants, partridges; and other game there; the defendant pleaded certain letters patent, of 9th November, 15 Jac. 1, to Sir *Richard*

*James I.* granted to *R. T.* and his heirs the King's manor and town of *Aulton*, and the King's hundred of *Aulton*, with its rights, and all other things

to the said manor and hundred belonging; and also, that they should have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and on all other lands and woods being in the same hundred, &c., although the same demesne and other lands were within the King's forest, &c.:—*Held*, that this grant did not confer a right of free warren over the King's lands within the hundred, but that the term "demesne lands" applied to lands held by *R. T.* as lord of the manor of *Aulton*, and that "other lands" applied to tenemental lands held by *R. T.* in fee of the King, or of any other lord, within the limits of the grant.

The term "demesne lands" properly signifies lands of a manor which the lord either has or potentially may have *in propriis manibus*.

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*Tichborne*, and deduced title from the grantee to Lord *Sherborne*, under whom the defendant justified as servant; and, upon a special verdict, the question was, whether by the letters patent, 15 *Jac.* 1, a right of free warren was granted to Sir *Richard Tichborne* over all lands within the hundred of *Alton*, over which the Crown had the power of granting such a right, or whether the right of free warren was not limited to the demesne and tenemental lands of Sir *Richard Tichborne* at the time of the grant.

The forest of *Alice Holt* and *Woolmer* is a royal forest, of which immemorially the kings and queens of *England* have been seised in their demesne as of fee in right of their crown. In the 15 *Jac.* 1, it contained, and still contains, within its perambulation, fifteen thousand four hundred and ninety-three acres of land, of which eight thousand six hundred and ninety-three were and are the demesne lands of the respective kings and queens, and held and retained by them respectively in their own occupation, and the remaining six thousand eight hundred acres were and still are held in fee simple by divers subjects. The whole of the forest, with the exception of about three thousand acres, is in the hundred of *Alton*, as likewise is the *locus in quo*, which is part of the demesne lands of the Crown, and in the occupation of the King.

On the 19th *November*, in the fifteenth year of his reign, King *James* the First made his letters patent as follows:—

“ Know ye that &c., we &c., have given and granted, and by these presents for us, our heirs and successors, do give and grant to *Richard Tichborne*, knight, his heirs and assigns, for ever, all that our manor and town of *Aulton*, in our county of *Southampton*, with all their rights, members, and appurtenances; and all that our hundred of *Aulton* in the aforesaid county of *Southampton*, with all its rights,

members, and appurtenances; and all those our small rents in the aforesaid town of *Aulton*; and also, all that the manor of *Aulton*, and our whole town of *Aulton*, in the aforesaid county of *Southampton*, with the hundred, and with the small rents in the same town, and all other things to the said manor and hundred belonging; which manor and town of *Aulton*, with the hundred aforesaid, and other the premises above by these presents granted, are by a particular thereof mentioned to be in the whole of the yearly rent or value of thirteen pounds thirteen shillings and fourpence, and to have been formerly parcel of the lands and possessions of *Edmund*, formerly Earl of *Kent*; and all and singular our messuages, mills, houses, edifices, buildings, barns, stables, dovecotes, gardens, orchards, garden grounds, lands, tenements, meadows, feedings, pastures, commons, demesne lands, glebe lands, wastes, furzes, heaths, moors, marshes, woods, underwoods, and trees; and all the land, ground, and soil of the same woods, underwoods, and trees; and also the oblations, obventions, fruits, profits, waters, fisheries, fishings, suit, soke, mulcture, warrens, mines, quarries, rents, revenues, and services, rents-charge, rents-seck, and the rents and services as well of free as customary tenants, the works of fee farm tenants, annuities, knights' fees, wards, marriages, escheats, reliefs, heriots, chases, parks, assarts, purprestures, fines, amerciaments, courts leet, view of frank-pledge, court and leet of purchases and profits, and all things to courts leet and view of frank-pledge belonging, hundred courts, cattle waived, estrays, natives, male and female, and villains, with the sequels, estovers, and common of estovers, fairs, markets, tolls, tollages, customs, rights, jurisdictions, franchises, privileges, profits, commodities, advantages, emoluments, and hereditaments whatsoever, of what kind, nature, or species they may be, or by whatsoever names they may be known, understood,

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called, or distinguished, situate, lying, and being, coming, growing, renewing, or increasing, within the aforesaid parish and town of *Aulton*, or elsewhere, within the aforesaid county of *Southampton*, to the aforesaid manor, town, hundred, and other the premises above by these presents granted, or any of them, or any part or parcel thereof, in anywise belonging, appertaining, incident, appendant, or incumbent, or as member, part, or parcel of the aforesaid manor, town, hundred, and other the premises above by these presents granted, or any of them, at any time heretofore had, known, accepted, occupied, or reputed; and all our part and purpart of the premises and every of them; and the reversion and reversions, remainder and remainders whatsoever of the aforesaid manor, town, hundred, lands, tenements, and hereditaments, and other the premises above by these presents granted, or mentioned to be granted, and of every parcel thereof, dependant or expectant of, in, or upon any lease or leases, grant or grants, gift or gifts, in fee tail or fees tail, or for term or terms for life, lives, or years, or otherwise, of the premises by these presents above granted, or mentioned to be granted, or of any part or parcel thereof, by any deed being of record or not of record;—And also, all and singular rents and yearly profits whatsoever, reserved upon any lease or leases, grant or grants, gift or gifts, of the premises above by these presents granted, or mentioned to be granted, or any part or parcel thereof, in any manner heretofore made, being of record or not of record; and the rents and yearly profits of all and singular the same premises above by these presents granted or mentioned to be granted, and every part thereof; and all writs and suits of partition or portion making, and all writs and suits of *scire facias*, and other suits for the making or having of partition of the premises or any parcel thereof. And also, that the said *Richard Tichborne*, Knight, and his heirs, shall for ever have and hold the

return of all our writs, precepts, mandates, and bills, (and those of) our heirs and successors; and also the summonses, estreats, and precepts of our *Exchequer*, and of the *Exchequer* of our heirs and successors; and the estreats and precepts of our Justices (and those of) our heirs and successors in eyre, as well to pleas of the Crown, common pleas, and pleas of the forest, and other Justices whomsoever, attachments, as well of pleas of the Crown as of others, within the hundred, manor, and town aforesaid; and that the aforesaid *Richard Tichborne*, Knight, his heirs and assigns, by himself and his bailiffs and servants, shall have in the hundred, manor, and town aforesaid, all execution and executions whatsoever of the aforesaid writs, precepts, mandates, bills, summonses, and estreats, and every of them, and all other things whatsoever, which to the office of sheriff, within the hundred, manor, and town, belong, or shall hereafter belong, so that no sheriff, bailiff, or other servant of us, our heirs, or successors, shall enter the hundred, manor, and town aforesaid, or any parcel thereof, to make or execute any distresses, attachments, or executions of writs, precepts, mandates, bills, summonses, and estreats aforesaid, or any of them, for any office or any thing touching their office to be done or executed, nor shall thereupon in any manner intrude, unless in default of the aforesaid *Richard Tichborne*, Knight, and his heirs and assigns, and his servants;—And also, that the said *Richard Tichborne*, Knight, his heirs and assigns, shall have, for ever, all and all manner of fines for trespasses, contempts, and other faults whatsoever, and fines for licence of according amerciaments, and all redemptions, issues, and penalties forfeited, (or) from this time to be forfeited, and all forfeitures whatsoever, year, day, and waste, and estrepement, and all things which to us, our heirs, and successors can belong of such year, day, waste, and estrepement, as well of all his men as of all his tenants holding entirely and not entirely, resident and not resident,

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and other residents whomsoever, of and in the hundred; manor, and town aforesaid, and all fees to the hundred or manor aforesaid belonging or appertaining; although the same men, tenants, or resident tenants, or servants of us, our heirs or successors, in any of our Courts (or those of) our heirs or successors, or tenants resident and not resident, and others resident, may as well before us, our heirs and successors, as before us, our heirs and successors, in our *Chancery* (and that of) our heirs and successors, and before our treasurer and barons of our *Exchequer* (and that of) our heirs and successors, and before our barons (and those of) our heirs and successors of our *Exchequer*, and also before our heirs' and successors' Justices of the bench, and before the coroner or coroners of us, our heirs and successors, and before the steward, marshal, and clerk of the market of our household, (and that of) our heirs and successors for the time being, or any of them, in any of our Courts, (or those of) our heirs and successors, as before the Justices in eyre, pleas of the Crown, common pleas, and pleas of the forest, Justices assigned to take the assizes, deliver gaols, or Justices assigned to hear and determine trespasses and felonies, and other our Justices, (and those of) our heirs and successors, as well in our presence, (as that of) our heirs and successors, to make fines and amerce issues and penalties forfeited, and what shall happen to be adjudged for such year, day, waste, and forfeitures; which fines, amerciaments, redemptions, issues, and penalties, year, day, waste, estrepement, and forfeitures, might belong to us, if they had not been granted to the aforesaid *Richard Tichborne*, Knight, and his heirs and assigns, may levy, take, and have for ever, by themselves, or by their bailiffs or servants, all and singular the aforesaid amerciaments, redemptions, issues, penalties, and forfeitures, and every of them, as well of such men, as of such tenants entirely holding and not entirely holding, resident and

no trespicer, and elsewhere resident, whomsoever and every of them;—And all things, which to us, our heirs and successors, can belong, respecting the year, day, and waste or estrepement aforesaid, without hindrance or impediment of us, our heirs or successors, Justices, escheators, sheriffs, coroners, bailiffs, and other our officers or servants whomsoever, or those of our heirs or successors; although the same men or tenants, entirely holding and not entirely holding, resident and not resident, and elsewhere resident, are, or shall be, officers or servants of us, our heirs and successors, or who else in any manner held of us, our heirs or successors, or of any other persons. And also, that they shall for ever have the chattels, as well of their own men as of all their tenants, entirely holding and not entirely holding, resident and not resident, and of other residents whomsoever, of and in the hundred, manor, and town aforesaid;—And all fees of the hundred or manor aforesaid belonging, heretics, lollards, thieves, as well great as small, murderers, felons, fugitives, persons condemned, attainted, and convicted, and put in exigent, and every of them; although the same shall be men, tenants, and resident tenants, servants, or officers, of us, our heirs or successors; so that, if any of the men or tenants, resident and not resident, and others of this kind resident, shall for any fault or ill-doing whatsoever, of any kind or species, or any of them ought to lose life or member, or shall flee, and will not stand in judgment, or other default made whatsoever, for which he ought to lose his goods and chattels, wheresoever he ought to receive justice, whether in our Court or that of our heirs or successors, or in any other of our Courts whatsoever, all and singular the same goods and chattels shall be of the aforesaid *Richard Tickborne*, Knight, his heirs and assigns; and that the same *Richard Tickborne*, Knight, his heirs and assigns, shall have the chattels of felons, of every degree of persons, condemned or convict-

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ed, felons of themselves, fugitives, escapes of felons, and all fines whatsoever, to be assessed or made in any of our Courts, or those of our heirs and successors, as well before us, our heirs and successors, as others of our Justices, Judges, and servants, and those of our heirs and successors whomsoever, or any of them;—And also the chattels of all persons put in exigent for felony; and also the chattels of fugitives, and waifs whatsoever, and chattels of every kind confiscated, as well of his men as of all his other tenants, entirely holding and not entirely holding, resident and not resident, and others whomsoever resident within the hundred, manor, and town aforesaid; although the said tenants are not entirely holding of the same *Richard Tichborne*, Knight, his heirs or assigns, or if the same tenants, or the said men, or the said resident tenants, or any of them, shall be officers or servants of us, our heirs or successors; and that those goods and chattels are the aforesaid *Richard Tichborne's*, Knight, (and those of) his heirs and assigns;—And that it shall be lawful for the aforesaid *Richard Tichborne*, Knight, and his heirs or servants, without our impediment, or (that of) our heirs or successors, Justices, escheators, sheriffs, coroners, or other our bailiffs or servants, or (those of) our heirs or successors whomsoever, to put themselves in seisin of all and singular the goods and chattels aforesaid, and to take, seize, or retain all those things to the use and behoof of the same *Richard Tichborne*, Knight, and his heirs; notwithstanding all the same goods and chattels should be previously seized by us, our heirs, servants, or successors;—And that they, for ever, within the hundred, manor, and town aforesaid, shall have and hold, and may and shall have and hold, view of frank-pledge, and whatsoever to such view appertains or belongs, or what can hereafter belong to view of frank-pledge; and that they shall have all goods and chattels, which are named or called waifes and straves, deodands, treasure trove, and

other things or chattels, found in the hundred, manor, and town aforesaid; and the goods and chattels called hand labour, taken or to be taken with any person where-soever within the hundred, manor, and town aforesaid, before any Judge, by the same person to be taken notice of. And that the aforesaid *Richard Tichborne*, Knight, his heirs and assigns, shall have for ever all manner of deodands within the hundred, manor, and town aforesaid; and that such goods and chattels called hand labour, deodands, and all which to such deodands belong, shall for ever be the aforesaid *Richard Tichborne's*, Knight, his heirs and assigns; and that it shall be well lawful for them of all and singular the aforesaid goods and chattels, which are called or named waifes and strays, treasure trove, and other things or chattels found, goods and chattels called man-opera, and deodands, and of all things to such deodands appertaining, as often and when they shall happen, by themselves or by their bailiffs and servants, to put themselves in seisin and possession, and all those things to seize and take, and the same to retain to the use and behoof of the same *Richard Tichborne*, Knight, his heirs and assigns, without any disturbance, molestation, or impediment of us, our heirs or successors, Justices, escheators, sheriffs, coroners, or other our bailiffs, (or those of) our heirs or successors, or of any other person whomsoever; although those things may have been seized by us, our heirs or successors, or any of our bailiffs, officers, or servants, (or those of) our successors. And also, that they in the hundred, manor, town, tenements, and hereditaments aforesaid, shall have and make by their proper stewards and bailiffs, the assize and assay of bread, wine and ale, and all manner of other victuals, measures and weights whatsoever, and to do and execute all other matters which belong or can belong to the office of the clerk of the market of our household, and that of our heirs or successors, so often and whensoever it shall

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be of use and necessity, as fully as if the same clerk of the market of our household, and that of our heirs or successors might do or ought to do, in the presence of us, our heirs or successors, if the present grant had not been made to the aforesaid *Richard Tichborne* and his heirs. And that the same *Richard Tichborne*, Knight, and his heirs, shall have all manner of amerciements, fines, and other profits thereupon arising, to be received and levied by themselves and their servants, without the hindrance of us, our heirs or successors, clerk of the market or other servants of us, our heirs or successors whomsoever; so that the aforesaid clerk of the market of our household, (or that of) our heirs or successors, shall not enter the hundred, manor, or town, tenements, or hereditaments aforesaid, or to do or execute any thing there which to his office belongs, or can hereafter in anywise belong. And we have further granted, and by these presents do grant for ourselves, our heirs and successors, to the aforesaid *Richard Tichborne*, Knight, his heirs and assigns, *That they shall for ever hereafter have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and in all other lands and woods in the (same) hundred, manor, town, tenements, and hereditaments being, although the same demesne lands and other lands and woods are, or may be, within the bounds of our forests (or those of) our heirs or successors,* so that no Justice, forester, or servant of us, our heirs or successors, or any other person, shall enter the hundred, manor, town, demesne lands, or other lands, woods, tenements, or hereditaments, to chase in them, or to take any thing which to warren and chase belongs, or any thing which belongs, or may belong, to the office of forester, or of any other officer or servants of us, our heirs and successors, foresters or chasers of us, our heirs or successors, in any manner, without the licence of the aforesaid *Richard Tichborne*, Knight, and his heirs, &c. And that the

aforesaid *Richard Tichborne*, Knight, his heirs and assigns, shall for ever hereafter have, hold, and enjoy, and shall have in their power to have, hold, and enjoy, within the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and all and singular other the premises above by these presents granted, or mentioned to be granted, and within every parcel thereof, so many, such like, the same of such kind and similar courts leet, view of frank-pledge, hundred courts, law-days, assize and assay of bread, wine, and ale, cattle waived, estrays, chattels of felons and fugitives, felons of themselves and put in exigent, knights' fees, wards, marriages, escheats, reliefs, heriots, free warrens, free chases, fairs, markets, and all other rights, jurisdictions, franchises, liberties, customs, privileges, profits, commodities, advantages, emoluments, and hereditaments whatsoever, how many, such, and which, and so fully, freely, and entirely, and in as ample mode and form as the aforesaid *Edmund*, formerly Earl of *Kent*, or any other or others heretofore having, possessing, or being seised of the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and other the premises above by these presents granted, or mentioned to be granted, or any part or parcel thereof, with all their appurtenances, ever had, used, or enjoyed, or ought to have, use, or enjoy, in the premises above by these presents granted, or mentioned to be granted, or in any parcel thereof, by reason or pretence of any charter, gift, grant, or confirmation by us, or by any of our progenitors or ancestors, late kings or queens of *England*, heretofore had, made, granted, or confirmed; or by reason or pretence of any act of Parliament, or any acts of Parliament, or by reason or pretence of any legal prescription, use, or custom, heretofore had or used, or otherwise by any lawful means, right, or title, and so fully, freely, and entirely, and in such ample manner and form, as we, or any of our progenitors or ancestors, late kings

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or queens of *England*, the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, above by these presents (granted) or mentioned to be granted, or any parcel thereof, have had and enjoyed, or ought to have and enjoy. We further give, and by these presents for us, our heirs and successors, grant to the aforesaid *Richard Tichborne*, Knight, his heirs and assigns, the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and other the premises above by these presents granted, or mentioned to be granted, with all their appurtenances, as fully, freely, and entirely, and in as ample mode and form as all and singular the same premises, or any parcel thereof, came or ought to come to our hands, or to the hands of any of our progenitors or ancestors, late kings or queens of *England*, by reason or pretext of the dissolution or surrender of any late monastery, abbey, or priory, or by reason or pretence of any exchange or purchase, or of any gift or grant, or by reason or pretence of any act of Parliament, or any acts of Parliament, or by reason of any attainder or forfeiture, or by reason of escheat, and by reason of any reversion or remainder, or any other manner of right or title, and which in our hands now are or ought to be, to have, hold, and enjoy the aforesaid manor, town, hundred, messuages, lands, tenements, meadows, feedings, pastures, woods, underwoods, courts leet, view of frank-pledge, hundred courts, profits, commodities, advantages, emoluments, and hereditaments, and all and singular other the premises above by these presents granted, or mentioned to be granted, with all their rights, members, and appurtenances, to the aforesaid *Richard Tichborne*, Knight, his heirs and assigns, to the sole and proper use and behoof of the same *Richard Tichborne*, Knight, his heirs and assigns, for ever, to hold the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and all and singular other

the premises above by these presents granted, with all their appurtenances, of us, our heirs and successors, by Knights' service, *viz.* by the service of the fortieth part of one knight's fee for all our rents, services, exactions, and demands whatsoever, to be therefore in anywise rendered, paid, or done to us, our heirs and successors, &c. And, moreover, for the full and perfect assurance, extinction, and bar of all and all manner of estate or right, which we have, or ought to have, in fee, tail, or otherwise howsoever, of and in the aforesaid hundred, manor, and town aforesaid, and other the premises, and in every parcel thereof, or which be, can come, or ought to come to us by hereditary descent, and every reversion and remainder thereupon to us belonging or appertaining; it is our pleasure, and we do by these presents, for ourselves, our heirs and successors, of our special grace, and of our certain knowledge and mere motion, covenant and grant to the aforesaid *Richard Tichborne*, Knight, his heirs and assigns, that within one year now next ensuing after the date of these presents, a fine with proclamation, according to the form of the statute in that case made and provided, shall be levied of the aforesaid hundred, manor, and town aforesaid, and other the premises, with the appurtenances, in manner and form following, (that is to say), that the aforesaid *Richard Tichborne*, Knight, shall acknowledge, the aforesaid hundred, manor, and town, with the appurtenances, and other the premises, by apt and convenient names, to be our right, as those which we have of the gift of the aforesaid *Richard Tichborne*, Knight; and thereupon we will, by the same fine, grant and render the aforesaid hundred, manor, and town, with the appurtenances, and other the premises in the same fine to be comprised, to the aforesaid *Richard Tichborne*, Knight, and his heirs, for ever. And the aforesaid *Richard Tichborne*, Knight, and his heirs, shall have the like power and licence. We also give and grant by these presents,

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that, after such fine shall be levied, it shall be fully lawful for the aforesaid *Richard Tichborne*, Knight, his heirs and assigns, into the hundred, manor, and town aforesaid, with the appurtenances, and other the premises in the fine aforesaid to be comprised, to enter, and the issues, rents, and profits thereof to take, without any petition or demonstration of right, and without any writ or warrant *de amoveas manuum* of us, our heirs or successors, or any other writ or warrant, and without asking or obtaining any other leave of us, our heirs or successors, for that purpose," &c.

The hundred of *Alton* consisted of nineteen parishes, part of which were out of the perambulation of the forest and in the hands of subjects. In the 10 *Jac.* 1, Sir *R. Tichborne* held courts leet for the hundred of *Alton*, and he and his successors continued so to do. In the reign of *Charles* the First, a justice seat was holden for the forest of *Alice Holt* and *Woolmer*, at which no claim of free warren was made by *Amphillis Hyde*, (a *feme covert*), daughter and heiress of Sir *R. Tichborne*. Queen *Elizabeth* granted to Sir *W. Knollis* the office of lieutenant and warden of the forest, which was continued from time to time, and for the last eighty years was held by the descendants of Sir *R. Tichborne*, who, whilst they were so entitled to the office, shot over the *locus in quo*, and killed pheasants, partridges, &c., and converted them to their own use.

*R. Bayly*, for the *Attorney-General*.—The grant in question is *toid*, and nothing passed by it to Sir *R. Tichborne*. No evidence appears of the user of this franchise; on the contrary, the Crown has from time immemorial been possessed of the close in question, and has exercised all rights over it; the inference from which is, that, at a remote period, this grant was found to be totally ineffectual, and consequently was never acted upon. Ancient grants avail nothing.

without evidence of possession consistent with them. *Chad v. Tilsed* (a). But there seems to have been a reason why this grant should be inoperative; because the lieutenancy and wardenship of the forest were granted so early as the reign of *Elizabeth*; a grant of privileges totally inconsistent with the franchise now claimed; and there being no recital of the previous grant in these letters patent, the King was deceived in his grant, and the letters patent are *void*.

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The grant is of the hundred, and though the close in question is in the hundred, it is not parcel of the hundred, or of and belonging to the hundred. In *Bays v. Bird* (b), it is said "a hundred is only a franchise, consisting of a court, called the hundred court, and probably has the return of writs, and by such grant the franchise passes, but not all the grantor's land in the hundred." The hundred, therefore, may have been granted without a grant of the lands within the hundred. At this day, the King cannot grant a manor; and if any one grant part of the demesnes, they are severed from the manor, and never can be reunited. *Lemon v. Blackwell* (c), *Reg. v. Duchess of Buccleugh* (d). If, therefore, the grant had been of all lands parcel of the hundred, it would not follow that these lands were parcel of the hundred. On the contrary, the evidence shews that they have been immemorially in the possession of the Crown. But the Crown is prohibited by stat. 2 Ed. 3, c. 12, and 14 Ed. 3, c. 9, from granting a hundred. *Darby v. Foxley* (e), 4 Inst. 267, *Rex v. Kingsmill* (f).

The King cannot grant free warren and free chase over the lands of a subject without his consent; and it is proved, that three thousand acres of the hundred were, at the time of the grant, in the possession of subjects.

(a) 2 B. & B. 403; 5 Moore, 185.

(b) 2 P. Wms. 400.

(c) Skin. 192.

(d) 6 Mod. 151.

(e) Rol. Rep. 119.

(f) 3 Mod. 199.

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[*Bayley*, B.—But he may grant free warren and free chase over the lands of the grantee, and over his, the King's, own lands.]

The words, “in all other lands and woods,” cannot be construed to mean the lands and woods of all other persons whatsoever; for various subjects held lands within the forest at the time this grant was made.

[*Bayley*, B.—There would be three different descriptions of land within the forest, in reference to which the right might be exercised—lands of the grantee, lands of strangers, and lands of the Crown. Over the lands of strangers the King could not confer this right. The King might do so over the lands of the Crown,—and we must look to the language of the deed, perhaps being assisted by the usage, to see whether the King meant to confer that franchise.

Lord *Lyndhurst*.—The expression, “and over all other lands,” cannot be taken in its general sense, for that would be contrary to law. The question is, whether it would embrace the lands of the Crown, unless such lands are specifically mentioned.]

Without some special description, it cannot include the lands of the Crown; and the very uncertainty is a ground for avoiding the grant. *Com. Dig. Grant*, (G.) 6. The grant is therefore totally void; but if it be not void, a limited construction must be put upon the words consistent with the usage. The Court will not, by construction, extend the words, or favour the grant of a free-warren. *Carr v. Smith* (a).

(a) K. B., M. T., 1812.—The following report of this case was stated by Mr. B. *Bayley*, during the argument.—“It was an action of trespass, for hunting in the plaintiff's close. The defendant pleaded, that it was part of the forest of *Bleasdale*, whereof the King

was seised, in right of the duchy of *Lancaster*; that the King gave to *I. F. C.* the office of gamekeeper, and that he made the defendant deputy. There was a replication, that *James I* was seised of certain vaccaries, whereof the close in question was parcel, and of

*Manning*, for the defendant.—It appears from the grant, that what the King professed to grant, had been formerly part of the possessions of *Edmund*, Earl of *Kent*; the property therefore was, before the grant, in the hands of a subject; and it is probable from the finding, that *Sir Richard Tichborne* was seised of some of these immunities in the 10 *Jac.* 1, that he merely took a re-grant from the Crown of what he had before. At the time of the grant, the Crown was seised of the forest, including free chase and free warren; and therefore, if the Crown were seised of forestal rights over the *locus in quo*, it would be as capable of making a grant of free warren over the *locus in quo*, as if the estate had been in the hands of the Crown. In the construction of the grant, the intent, and not the precise words, is to be regarded. *Evans v. Ascough* (a). The words of the grant of free warren are divided into two branches—in the lands of *Sir R. Tichborne*, within the hundred—and also in all other lands and woods, in the same hundred, &c. The

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free warren within the same, and granted the vaccaries and free warren to *I. S.*, under whom the plaintiff claimed. There was a rejoinder denying the grant, and therefore the question was, whether the vaccaries and free warren were granted or not. On the trial it appeared, that *King James I.*, granted to *I. S.* certain manors and these vaccaries, and all woods and trees upon any of the premises; that the grant, in the general words, after the description of the premises, had the word 'warrens;' and that, in another part, the King granted to *I. S.* all courts leet, and waifs, and hereditaments, free warrens, and all other rights, &c., as freely as the King or his predecessors had or

ought to have enjoyed them in the premises granted, or as any former predecessors had enjoyed them. There was a special case, and on argument the Court was clear, that, as it did not appear that the *locus in quo* was applied to purposes of warren at the time of the grant, or that any distinct right of free warren, independent of the general forest right, was subsisting upon it; and as there were no words to shew an intention in the Crown to create such a right, and pass it *de novo*, the grant did not pass such right; that the issue, therefore, was against the plaintiff, and *postea* to the defendant."

(a) *Latch*, 248.

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ordinary form of the grant of free warrens is, that it is to be exercised in the demesne lands of the grantee, provided they do not come within the bounds of the royal forest; but here the word "*suis*" is omitted purposely, and the words "all other lands" are used in opposition to the words "demesne lands;" and instead of the qualification, it is to be exercised there, though the lands may be within the royal forest.

[*Bayley, B.*—Might not the words "all other lands" be satisfied, by extending the warren over the lands of Sir *R. Tichborne*, not demesne lands of the manor of *Alton*. It may be doubtful, whether these words apply to the lands of the Crown or to the lands of the grantee; and then usage may be very important to explain their meaning. The demesne lands are the demesne lands of the manor, and the manor is not co-extensive with the hundred.]

In the grant of free warren, the demesne lands are not spoken of as the demesne lands of the manor of *Alton*. Upon the subject of demesne lands, *Bracton*, p. 263 a, says, "*Et sciendum est, quod dominicum dicitur, ad differentiam ejus quod tenetur in servitio, et unde dicitur tota die, quod videndum erit quid quis teneat in dominico, et quid in servitio. Et regulariter verum est, quod dominicum dici potest, omne illud tenementum de quo antecessor obiit seysitus ut de feodo, sive cum usufructu vel sine, et de quo si ejectus esset dum viveret recuperare posset per assisam novæ disseysinæ.*"

In *Fowler v. Seagrave* (a), *Nota, per Coke, C. J.*—*"When a man claims a warren infra omnes terras dominicales, the cannot extend this into the land of freeholders; for, when any one claims a warren by charter, he cannot clearly enlarge this beyond the charter, but he ought to take the same as it is expressed in the charter, and not otherwise; otherwise it is where he claims the warren by*

(a) 2 Bulstr. 254.

prescription, and this is the difference; the Court agreed with him herein." This, therefore, is an authority by Lord Coke, that a grant of free warren *infra omnes terras dominicales*, would extend over all the lands of the grantee, except those lands which were held *in servitio* by freeholders, under the grantee; and therefore, he considers, that all lands not *in servitio*, if they belong to the lord by any title, must be *terras dominicales*. So, in *Higham v. Best* (a), Popham, J., said: "If the Queen grants me free warren within my manor, I shall have it within my own demesnes only, for, if otherwise, the Queen should impose a charge upon another, which the law will not suffer." In the opinion of Popham, therefore, and the rest of the Court, *terras dominicales* applied to all the lands of the grantee; for, if they applied merely to particular lands, such as the demesne lands of a manor, it would not be true that, by extending the grant beyond the demesne lands of the grantee, a charge would be imposed upon a stranger. *Fitz. Abr. tit. Barre*, pl. 198, and 3 *H. 6*, fol. 13, pl. 15, are to the same effect.

[*Bayley, B.*—If the lord of the manor of *Alton*, before the grant, had purchased freeholds previously enfranchised, though lying within the manor, they would not become demesne lands of the manor.]

The words "demesne lands" do not mean the demesne lands of the manor, but all lands come within that description which are not held by freehold tenants. All lands in which there is a freehold interest, are either tenemental or demesne. The close in question is the demesne of the Crown, and is comprehended within the second branch. The demesne lands comprehend all the lands of Sir *Richard Tichborne*, and the other lands are the lands of the Crown within the hundred.

There is no inconsistency between this grant and the

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grant of the rangership of the forest made by Queen *Elizabeth*, and renewed from time to time. By this grant, the officers of the King are excluded from interfering with the right of free warren. The beasts of forest and the beasts of warren are not the same, except the hare, with respect to which the ranger would protect them for the Crown, and the grantee of the free warren might kill them for his own use. Moreover, the forest extends beyond the hundred, and part cannot be affected by this grant. If, therefore, instead of the rangership, the forest had been granted, the grantee would have taken a totally different right, applying, except as to the hare, to a totally different description of animal, and extending over a distinct district.

Then, with respect to the user.—It appears that for the last eighty years the rangership and right of free warren have been united in one person, and therefore it is impossible to prove an user, under this grant, of the right of free warren over the *locus in quo*. However, during that time, pheasants have been killed by a person uniting the two characters upon the spot in question, and converted to his own use. As ranger, he could not do so, because he would be bound to apply them to the use of the owner; but it was a lawful exercise of the right of free warren. The owner of a free warren could not intermeddle with the red deer, 22 *Viner*, 430; and, therefore, it was reasonable that the successors of Sir *R. Tichborne*, having a right of free warren, should be desirous of obtaining the appointment of ranger of the forest, whereby they might extend their right over a larger district, and to all beasts.

But the grantee is not bound to shew an user at any distance of time. The third resolution in the *Leicester Forest* case (a), is this:—"They all held that they may prescribe to have warrens, or to keep sheep in forests, although

(a) Cro. Jac. 155.

they were on the King's lands; but without a special prescription it cannot be : and in such case of prescription, free warren, although it had not been used for divers years, if he had it by grant, or can prove it by prescription, a non-user is no cause of forfeiture thereof." The non-user of a fair or market, or courts, or such like liberty, wherein the subjects have an interest for their common benefit, is cause of seizure; but the non-user of parks or warrens, or such like, which are to the profit only or pleasure of the owner, is no ground of loss or forfeiture. (*Co. Lit.* 233. a.) :

[*Bayley*, B.—That is, you shall not lose by non-user a right to free warren proved to have existed by grant or prescription; but you must shew clearly that it existed, before that question can arise.]

In the cases of mines (a), *Dyer*, C. J., said, if the Queen has a mine royal in the soil of *I. S.*, and she, *ex gratiâ speciali, certâ scientiâ, et mero motu*, grants to a stranger all mines which she has in the lands of *I. S.*, the mine royal shall pass, for else the words would be *void*, and without effect. So here, the second branch of this grant would be *void*, unless it extends to lands of which Sir *R. Tichborne* was not seised. The words in *Smith v. Carr* were mere general words.

*Bayley* replied.

*Cur. adv. vult.*

LORD LYNTHURST, C. B., now delivered the judgment of the Court as follows:—

This case came before the Court upon a special verdict, and the material question was, whether, under the letters patent from King *James* the 1st (15 *Jac.* 1st) to Sir *Richard Tichborne*, a right of free warren passed within the limits to which that grant extends, on what

(a) *Plowden*, 331, 337.

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then were, and ever since have been, and still are, the lands of the Crown. If no such right passed, the defendants have no ground of defence, and the plaintiff is entitled to the judgment of the Court. It is not found by the special verdict that there was any right of free warren over the land in question in existence at the time of the grant by King *James* (except as far as the Crown by its prerogative may be considered as having such a right), and therefore it must be taken that at that time there was no such right. The letters patent of King *James* contain no recital, but grant unto Sir *Richard Tichborne* and his heirs, all that our manor and town of *Aulton* (county of *Southampton*) with all their rights, &c., and all that our hundred of *Aulton*, with its rights, and all our small rents in the aforesaid town, and all other things to the said manor and hundred belonging, which manor and town, with the hundred, &c., are by the particulars thereof mentioned to be of the yearly value of 13*l.* 13*s.* 4*d.*, and to have been formerly parcel of the possessions of *Edmund*, Earl of *Kent*. The letters patent also granted to Sir *Richard Tichborne* and his heirs, all his, the King's, messuages, mills, houses, &c., lands, tenements, &c., services, &c., view of frank-pledge, profits of Courts, &c., to view of frank-pledge belonging, &c., franchises, &c., within the parish and town of *Aulton*, or elsewhere in the county of *Southampton*, to the aforesaid manor, town, hundred, and other the premises thereby granted, or to any of them belonging or appertaining. The letters patent also granted all the King's reversion and remainder in the manor, town, hundred, &c., and all rents. They also grant unto Sir *Richard Tichborne* and his heirs, the return of writs, and all fines and amerciaments, goods of felons, &c., and view of frank-pledge within the hundred, manor, and town aforesaid; and the assaying of bread, wine, and ale, and all other victuals within the hundred,

manor, town, and tenements aforesaid. Then comes the clause upon which the present question arises—"And further, we do grant to Sir *Richard Tichborne*, his heirs and assigns, that they shall for ever hereafter have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid and in all *other* lands and woods being in the same hundred, manor, town, tenements, and hereditaments; although the same demesne lands and other lands and woods be within the bounds of our forests, so that no Justice, forester, or officer of us, our heirs or successors, shall enter the hundred, manor, town, demesne lands, or other lands, woods, tenements, or hereditaments, to chase therein, or to take any thing which to warren or chase belongs, or any thing which belongs to the office of forester, &c., or other officer, without the leave of Sir *Richard Tichborne* and his heirs.

The letters patent then grant certain immunities to Sir *Richard Tichborne*, and provide that he and his heirs shall have and enjoy the aforesaid manor, town, hundred, &c., and, among other general words, free warrens and free chases, &c., in as ample mode and form as the aforesaid *Edmund*, Earl of *Kent*, or any others having or possessing the aforesaid manor, town, hundred, &c., and other the premises above granted, had or enjoyed the same, and as fully as the King or any of his progenitors ought to have had or enjoyed the same. They also contain a grant by the King for a fine *sur done, grant, et render*.

No other parts of the letters patent appear to bear upon the point in issue; and the question therefore is, whether such a grant as this shall in the King's case, where there is no recital of any intent to make a grant *de novo* of free warren over any lands, no recital of any intention to create such a burthen upon the King's own lands, where the words used do not necessarily imply an intention to create such a burthen, and where the provision for enjoying as

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freely as former possessors had enjoyed, and for levying a fine, rather imply an intention to grant only what had before been enjoyed, have the effect of giving the grantee a right of free warren over the King's own land.

A grant of free warren is in general confined to the lands of the grantee; the King cannot grant it over the lands of a third person; and though he might grant it over his, the King's, own lands, we are not aware of any instance in which it has been done. And, unless the words were such as to shew unequivocally that such was the intention, we think they would not have that effect (a).

The rules of construction upon grants from the Crown are much more favourable to the grantor than the rules of construction upon grants from ordinary persons. This is established by the case of the River *Banne*, in Sir *John Davis's Reports* (b), where it was adjudged that a grant of, among other things, all fisheries, would not pass a royal fishery; such as the Crown had by prerogative in the navigable part of a river, where the tide ebbs and flows; and that an exception of three-fourths of the fishery to the Crown would not make the other fourth pass by the grant, because the King's grant shall pass nothing by implication; and *Plowden* (c) lays it down, that words used by the King, which contain things royal and things of a base nature, shall, in favour of the King, be taken in such sense as serves best for the King, and as is agreeable with order and convenience, for, when the words stand indifferently, and may be construed one way or other, that which is most convenient shall be taken. And it is most convenient that things appropriated to the Crown, and to the prerogative royal, should tarry with the Crown, and not be severed from it without *special words*; and that words in patents

(a) 3 Co. 9 b; Sav. 70; 9 Co. 29 b; 10 Co. 63 a, 113 b; Dav. 55; Plow. 333, 334.

(b) Davis, 57.

(c) Page 333.

to subjects shall make such things to pass as are proper for and suitable to subjects. And for this, among other reasons, a grant by the King of all and singular mines within certain lands, was held to pass base mines only, such as copper, lead, &c., not mines royal, of gold and silver.

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In the case now before the Court, the letters patent grant the King's manor and town of *Aulton*, the King's hundred of *Aulton*, with its rights, and all other things to the said manor and hundred belonging; and also grants, that Sir *Richard Tichborne*, his heirs and assigns, should for ever thereafter have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and in all other lands and woods being in the same hundred, manor, town, tenements, and hereditaments, although the same demesne lands, and other lands or woods, be within the King's forest; so that none of the King's officers should enter the hundred, manor, town, demesne lands, or other lands, woods, tenements, or hereditaments, to chase therein, &c., without license from Sir *Richard Tichborne*, his heirs or assigns.

What, then, is the effect of the grant of free warren within their demesne land? And what the effect of the grant in all other lands and woods in the hundred, manor, town, tenements, and hereditaments?

It was pressed in the argument, that all their demesne lands meant all the lands within the hundred, &c. of which Sir *Richard Tichborne* was seised in fee; and that, then, the other lands and woods would, of necessity, mean the lands and woods of the Crown, because the King could not grant free warren or free chase *de novo* over the lands of a third person. Let us see, then, whether we are at liberty to say that this is the sense in which the words "demesne lands" are used in this charter; for, if we are not, the other lands and woods will not mean, of necessity, the lands and woods of the Crown, but will be satisfied by being

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applied to other lands of Sir Richard Tichborne, within the limits.

*Bracton* (a) treats of the question, "*Quid sit dominicum*," and considers it as having various meanings. "*Item, dominicum accipitur multipliciter. Est autem dominicum quod quis habet ad mensam suam et propriè, sicut sunt Bordlandes Anglice. Item, dicitur dominicum villenagium quod traditur villanis, quod quis tempestivè et intempestivè resumere possit pro voluntate sua et revocare. Item, potest dici dominicum de quo quis habet liberum tenementum, et alius usum fructum. Item, dici poterit dominicum de quo quis habet liberum tenementum, et alius custodiam. Eodem modo dici poterit dominicum, de quo quis habet liberum tenementum et alius curam; sicut dicitur de custode et curatore, et unde unus datur a jure, et alius ab homine. Et generaliter qualitercunque quis feoffatus fuerit in quacunque hora, in feodo sibi et hæredibus suis, vel si ex causâ successionis, ita quod assisam novæ disseysinæ habere posset si ejectus esset dum viveret, competit hæredibus suis assisa mortis antecessoris post mortem suam si seysitus moriatur. Et sciendum quod dominicum dicitur, ad differentiam ejus quod tenetur in servitio, et unde dicitur totâ die, quod videndum erit quid quis teneat in dominico, et quid in servitio. Et regulariter verum est, quod dominicum dici potest, omne illud tenementum de quo antecessor obiit seysitus ut de feodo, sive cum usufructu vel sine, et de quo si ejectus esset dum viveret, recuperare posset per assisam novæ disseysinæ licet alius inde haberet usufructum, et unde ad declarationem seysinæ antecessoris statim competit hæredi assisa mortis antecessoris si impeditus fuerit, ut seysinam habeat de tenemento sicut antecessor suus habuerit, et quod ad hæredem recognoscatur, salvo firmario termino suo. &c. &c. Item, unus tenere poterit in feodo quoad servitium, sicut dominus capitalis et non in domi-*

(a) Lib. 4, tr. 3, c. 9, s. 5, fol. 263 a.

nico, et alius in feodo et in dominico et non in servitio, sicut libere tenens alicujus, &c., &c." Bracton, therefore, speaks of the word (demesne) *dominicum*, as applying—*first*, to what a man has in his own hands, for his own table and support;—*secondly*, to what he has in the hands of his villein;—and, afterwards, more extensively, to whatever he holds in fee.

*Fleta*, which was written about a century after Bracton, (that is, 1340), seems to have had Bracton in view, and to have corrected him (a):—“*Dominicum autem multipliciter accipitur. Est autem dominicum propriè terra ad mensam assignata, et villenagium quod traditur villanis ad excolendum, et terra precariè dimissa quæ tempestivè et pro voluntate domini poterit revocari, et sicut est de terrâ commissâ tenendâ quamdiu commissori placuerit. S. 19—Poterit etiam dici dominicum de quo quis habet liberum tenementum, et alius usumfructum,*” (curam, &c., as in Bracton). S. 20—“*Dominicum etiam dicitur ad differentiam ejus quod tenetur et in servitio. Dominicum est omne illud tenementum de quo antecessor obiit seisitus ut de feodo, &c.*”

Spelman, besides referring to the passage from Bracton, says, “*Dominicum etiam vox forensis est et multiplex, Gallis domanium, Italis demanium, Anglis the demaine, quod nonnulli perperam scribunt demeane et demesne, ac si a Gal. de mesne,*” that is, “*sui ipsius proprium, non a Latino dominico nasceretur. Dominicum dicitur patrimonium domini, atque idem quod dominium. Nostri vero forenses recentiores solummodo pene utuntur, vel ad significandam fundi proprietatem, vel manerii partem, hoc est, terras et prædia quæ dominus hæreditariè non tradit suis tenentibus, sed aut suipsius manibus retinuit, aut ad annos aliquot, sive voluntatem elocavit. Vulgo, terræ dominicales, demaine landes.*” Ducange, in his Glossary, thus explains *dominicum*:—“*Dominicum—proprietas doma-*

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*nium, quod ad dominium spectat, quo dominus ad propriam alendam familiam fruitur. Unde, Anglis dominicum definitur quod quis habet ad mensam, sicut sunt prædia quæ Bordlandes iidem vocant;*” and he refers to the passages from *Bracton* and *Fleta*. He also refers to *Cowell*—“*Dominicum est tota illa terra intra manerium quod dominus feudi, aut in manibus suis retinet, aut saltem ad annos, aut voluntatem suam juxta consuetudinem manerii, aliis locat.*” Lord Coke says (a)—“*Dominicum* is not only that inheritance wherein a man hath proper dominion or ownership, as it is distinguished from the lands which another *doth hold of him in service*, but that which is manually occupied, manured, and possessed, for the necessary sustentation, maintenance, and supportation of the lord and his household, and savoureth *de domo*, of the house, either *ad mensam*, for his or their board and sustentation, or is manually received (as rents) for bearing or defraying of necessary charges, public or private. Of these, says our author, he should plead, that he is seised *in dominico suo ut de feodo*, i. e. *de feodo dominicali, seu terrâ dominicali seu redditu dominicali*, which is as much as to say, *demeyne* or *demaine*, of the hand, i. e. manured by the hand, or received by the hand, and therefore he calleth it *manual* occupation, possession, or receipt. And in *Domesday*, demesne land is called inland, as, for example, *4 bovatas terræ de inland, et 10 bovatas in servitio.*” In this passage it is obvious, that, when he speaks of that wherein a man hath proper dominion or ownership, he is speaking of what he holds as lord, not of what he may hold of another lord, and therefore holds *in servitio*; for, he speaks of such land as distinguished from what another holds of him *in servitio*, (and, unless he were lord, no one could hold of him); he speaks of what he keeps in hand, as kept for the necessary support of the “lord” (that is, himself) and his house-

(a) Co. Lit. 17. a.

hold; and, in speaking of the demesnes as *inland*, he puts in opposition to them what is *in servitio*. In his *Complete Copyholder*, Lord Coke applies the same term “inland” to demesnes, and gives such an explanation of the word “demesnes” as seems to shew clearly that it cannot admit of the large construction for which the defendant here contends—that is, “all the lands within the hundred,” &c., of which Sir *Richard Tichborne* was seised in fee—but that it was to be confined to *what were within his manor, and whereof he was lord*. The Saxons, he says (a); had manors in substance nothing differing from ours; they wanted neither demesnes nor services. Their demesnes they termed *inlands*, because the lords kept them in their own hands, and enjoyed them in their own possession. Their services they termed *utlands*, because those were in the manurance and occupation of certain tenants, &c. &c. In sect. 11, he gives a distinct explanation of the word demesne. “Demesne,” he says, “termed in Latin, *demanium, domanium, or dominicum*, is taken in a double sense, *proprie et improprie; proprie*, for that land which is in the King’s own hands—*domanium est illud quod consecratum, unitum, et incorporatum est Regiæ Coronæ*. Take *domanium* in this sense,” he says, “and then you exclude all common persons from being seised *in dominico*; for, admit the King pass over (that is, grant away) the demesne lands, as soon as they come into a common person’s hands, *desinunt esse terræ dominicales*; for, though the King’s patentee hath the land granted to him and to his heirs, yet, coming from the King, it must necessarily be holden of the King; but it is contrary to the nature of demesne lands to be holden of any.” S. 12—“Then, by this it appeareth, that those lands are termed improperly demesne, which are in the hands of an inferior lord or te-

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nant, nor can such a one in propriety of speech be said to stand seised of any land whatsoever *in dominico suo*; but if you observe narrowly the manner of pleadings, the words are used in a proper sense, for you shall never find that an inferior lord or tenant will plead that he is simply seised *in dominico*, but still with this addition, *in dominico suo ut de feodo*; and that very aptly, for this word 'fee' implieth thus much, that his estate is not absolute, but depending upon some superior lord. Therefore, we conclude with the feudists, that a common person may aptly be said to stand seised *in feodo*, or *in dominico suo ut de feodo*, but improperly *in dominico* simply (a)." He then refers to *Bracton* and *Fleta*; and, after noticing that copyholds are parcel of the lord's demesnes, he concludes (b) that those lands alone can properly be of the lord's demesnes (if any lands in the possession of inferior lords may properly challenge that name), which the lord reserveth in his own hands for the maintenance of his own board or table, be it his waste ground, his arable ground, his pasture ground, &c. Sir *William Blackstone* (c) takes the distinction noticed in the argument, between demesne and tenemental lands, and describes the demesnes as lands which the lord of a manor kept in his own hands for the use of his family; and they were called *terræ dominicales*, or demesne lands, being occupied by the lord, or *dominus manerii*, and his servants.

Upon these authorities, we think we are fully warranted in saying, that, though the word "demesne" may in some cases be applied to any fee-simple lands a man holds, yet it is more correct and usual to apply it to the lands of a manor, which the lord of that manor either actually has, or potentially may have, *in propriis manibus*.

The effect of the grant in question will then be perfect-

(a) Sect. 12.

(b) Sect 14.

(c) Vol. 2, p. 90.

ly clear. It will have conferred upon Sir *Richard Tichborne*, his heirs and assigns, a right of free warren and free chase in those lands within the manor of *Aulton*, which Sir *R. Tichborne* had, as lord of that manor, under the description of his demesne lands; and it will have conferred upon them a similar right in whatever tenemental lands Sir *R. Tichborne* then held in fee, either of the King, or of any lord, within the limits mentioned in the grant: but it will have conferred no other right. No other right, then, will have been conferred by implication, and the anomaly, not to say the indecorum, of a subject's right to freewarren and free chase in the lands of the Crown, whilst in the occupation of the Crown, will not have occurred. We have not noticed the case of *Smith v. Carr*, referred to upon the argument, because we think this case sufficiently clear upon the grounds we have mentioned.

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Judgment for the *Attorney-General*.

DAVIES *v.* GREY.

*Exch. of Pleas.*

THE defendant, a prisoner, gave notice, on *Wednesday*, 11th *January*, of putting in and justifying bail, at the same time, for *Saturday* the 14th. On that day the bail justified, but the officers of the Court doubting upon the construction of the rule *T. 1 W. 4 (a)*, whether due time had been given, refused to draw up the rule of allowance; and the defendant accordingly on that day served a notice continuing his former notice to the 17th. The officers having doubts whether this was sufficient;—

The rule *T. 1 W. 4*, which enables a defendant to put in and justify bail at the same time, upon giving four days' notice, is an enabling and not a disabling rule; and therefore, a prisoner, who before the rule might put in and justify bail upon a two days' notice, may still do so.

*Archbold*, who moved to justify the bail, mentioned the

(a) *Ante*, Vol. 1, p. 469.

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circumstances to the Court, and contended that the late rule applied only to cases in which the defendant could not put in and justify bail at the same time; that it was an enabling and not a disabling regulation; and that prisoners who before might put in and justify bail at the same time after two days' notice, might, notwithstanding the rule, still do so. He stated that such had been the uniform practice of the Court of *King's Bench* since the new rules.

BAYLEY, B.—It is desirable as far as possible to assimilate the practice of all the Courts; and I will consult my brother *Parke* upon the question.

The learned Baron sent the following questions to *Parke, J.*:—

“Before the new rules, could a prisoner put in and justify bail upon a two days' notice: no bail at all being put in at the time of giving his notice?

“And if he could, is this still the practice; or is it altered by the new rule?”

PARKE, J., after consulting the Master, returned the following answer:—

“He might before the new rule, and he may still. The new rule is an enabling and not a disabling rule.”

Bail allowed.

## BROWN v. SHUKER and Others.

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**D**EBT against the defendants, as co-heiresses, on the bond of their ancestor, conditioned for the performance of the covenants in an indenture of mortgage. Pleas, *first*, *non est factum*;—*secondly*, *per fraudem*;—and, *thirdly*, that the defendants had not, nor had either of them, at the time of exhibiting the bill, &c., nor at any time before or since, any lands, &c. by descent. Replication to the last plea, that the defendants, after the death of the ancestor, and before the commencement of this suit, to wit, &c., had lands in fee-simple, by descent, &c., concluding with a verification.

In an action against an heir on the bond of his ancestor, the defendant pleaded *riens per descent*, and the plaintiffs replied, under the statute, that the defendant had assets, &c., before the action commenced, concluding with a verification; the jury assessed the damages under the condition the bond, at a larger amount than the amount of the lands descended:—  
*Held*, that the execution for debt and costs must be confined to the value of the lands descended.

At the first trial of this cause, the Jury omitted to find the value of the lands descended, and the Court (a) awarded a *venire de novo*. The cause was tried a second time, before *Patteson, J.*, at the last Assizes for the county of *Salop*; when the Jury, under the direction of the learned Judge, found a verdict for the plaintiff, with 1s. damages for the detention of the debt, and 40s. costs; and they assessed the damages under the assignment of breaches at 1265*l.*, and found the value of the lands descended to be 486*l.* 8*s.* 6*d.*

Upon this finding, the Master having taxed to the plaintiff his full costs of suit—

*R. V. Richards* obtained a rule to shew cause why the Master should not review his taxation, and why the *postea* should not be amended; against which cause was now shewn by

*Jervis and Curwood*.—It will be contended, that the plaintiff is not entitled to damages for the detention of the

(a) 1 C. &amp; J. 583.

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debt, or to costs of suit. The question is new, and depends on the construction to be put upon the 5th and 6th sections of the statute 3 & 4 *W. & M.* c. 14.

*Marshal v. Willder* (a) shews, that where an executor pleads *non assumpsit* and *plene administravit*, and the plaintiff goes to trial on the general issue, and takes judgment of assets *quando* on the plea of *plene administravit*, he is entitled to full costs *de bonis testatoris &c.*, *et si non de bonis propriis*.

[*Bayley, B.*—Is there any instance of a judgment *et si non* as against an *heir*?]

The books of entries are silent upon this subject.

[*Lord Lyndhurst, C. B.*—The fifth section of the statute enacts, that execution shall be taken out against the heir to the value of the land descended, as if it were his own proper debt or debts. That expressly confines the execution to the value of the lands descended; and then the sixth clause has reference to the fifth, and enacts—“that execution shall be awarded as aforesaid;” and afterwards, as if to draw the distinction, it enacts, that, when judgment is given against the heir, by confession, it shall be for the debt and damages, without any writ to inquire of the lands, &c. so descended.

*Bayley, B.*—I take it, you were not bound to reply according to the statute. Here you have replied specially according to the statute; and that was the ground of our decision when this cause was last before us.]

The heir is charged as with his own debt; he must be charged in the *debat* and *detinet*; if he is charged in the *detinet* only, it is error. That obviates any objection as to charging him *de bonis propriis*. Before the statute, the heir was liable, *de bonis propriis*, on a false plea, although he was not liable on a plea of *non est factum*. The question here is, whether the statute has altered the law in that respect.

(a) 9 B. & C. 957.

The statute was certainly passed with an entirely different object. If, before the statute, the heir had aliened *bond fide*, before action brought, he was not chargeable at law. To prevent this inconvenience, the statute made him liable to the amount of the lands so aliened. There does not appear to have been any intention or contemplation of legislating on the subject of costs. The recital of the statute shews, that its object was to prevent fraud upon creditors. By the 5th clause it was intended to make the heir liable for the debt of the ancestor where he would not otherwise have been liable; but it was not the intention of the Legislature to take away any liability as to costs, to which the heir was previously subject. The debt is incurred by the ancestor, but the costs are an obligation incurred by the heir. The judgment must be for the debt. It could not be intended to put the heir in a better situation by pleading falsely, and taking the plaintiff down to trial; and yet such would be the effect of the construction contended for by the other side; for, if he let judgment go by default, &c., he is liable to costs; but on a trial, he is said, according to the argument, not to be so liable.

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[*Bayley, B.*—It may be, that you are entitled to judgment for the debt and damages; but the question is, to what extent you are entitled to levy them. Where there is no plea of *riens per descent*, as in the cases of judgment by confession or upon demurrer, the assets are taken as confessed to the amount of the debt. In that case you have an unlimited confession of assets; in the present case a limited amount of assets is ascertained by the verdict of a Jury.

Lord *Lyndhurst, C. B.*—When execution is taken out upon the judgment, it is limited by the statute. Suppose you have judgment for debt and costs, how is it to be levied? The statute says, “as aforesaid,” that is, by reference to the fifth section, “to the value of the lands descended.”]

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The limitation in the statute is as to the debt. The execution is limited, so that you can only levy the debt to the value of the lands descended; but the costs are the obligation of the heir, incurred by himself personally, and were not intended to be taken away by this statute.

*Campbell and Richards contra.*—The statute gives an advantage to the creditor, in giving a personal judgment and execution against the heir; and it is not unreasonable, that some advantage should also be given to the heir. He is made answerable for the debt, &c., to the value of the lands, &c. The execution, by the sixth section, is to be awarded as aforesaid, that must be, to the value of the lands. The words could hardly be more plain. The fifth section is express, that the execution is to be taken out to the value of the lands, and the words “as aforesaid,” in the sixth, refer to that limitation of the execution in the fifth. The Legislature clearly intended, when throwing a greater liability upon the heir, to give him some advantage. It makes him personally liable, but to the extent only of the lands descended.

BAYLEY, B. (a)—I cannot say that I have entertained any doubt on this question, which depends on the construction to be put upon the fifth and sixth clauses of the statute which has been referred to. Before that statute, if the heir had aliened the lands before action brought, he was not liable for the value of the land so aliened; and great mischief arose to creditors who were defrauded by such alienation. The statute altered the law in this respect. Now, here the plaintiff puts his case upon this statute.

(a) Lord Lyndhurst, C. B., had afterwards expressed by the rest of the Court.  
left the Court, after intimating that his opinion was the same with that

The sixth section enacts, that the heir may plead *riens per descent*, at the time of the original writ brought, or the bill filed against him; and then it provides, that the plaintiff may reply, that the heir had lands, &c., from his ancestor before the *original writ brought, or bill filed*. That is the form of the replication in this particular case, and, therefore, the plaintiff would be enabled, under it, to recover for the value of lands which had been aliened before the action, which he could not have done at common law. The section then proceeds to point out the consequence—"if, on issue joined thereupon, it be found for the plaintiffs;" and that consequence is, that "the Jury shall inquire of the value of the lands, &c., so descended." On the first trial the Jury did not assess the value of the lands, and, therefore, a *venire de novo* was awarded.

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Now, what is the provision in the statute as to the judgment and execution? That "thereupon judgment shall be given, and execution shall be awarded, *as aforesaid*." "As aforesaid" are words of reference, and they refer to the fifth section, which enacts, that when the heir shall have aliened before any action brought, &c., he shall be answerable to the value of the lands, &c. Supposing that the words, *to the value, &c.*, were applicable to the debt, the subsequent part points out expressly how the execution is to be awarded—"and such execution shall be taken out upon any judgment, &c., to the value of the said land, as if the same were his own proper debt," &c. How, then, is execution to be awarded upon the record on a judgment of this description? The judgment may, perhaps, be entered up, as if it were the heir's proper debt, for the debt, and damages for detaining the debt, and for costs *de incremento*; but, when you come to take out the execution, which the Legislature intended to give against the heir, you are limited to the value of the land descended. It may be hard, in a particular instance, like the present, that such language has been used; but, as it has been used, we must abide

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by it. It has been urged, that the provision at the end of the sixth section—"that if judgment be given against the heir by confession, or *nil dicit*, it shall be for the debt and damages," leads to a necessary inference, that the same judgment is to be given where the defendant pleads, and a verdict is found against him; and, it was said to be strange, that, where the heir failed on the trial, the execution should be limited to the value of the lands descended; but that, when he lets judgment go by default, the execution should be general, for the debt and damages. But, in that case, the heir does not state whether assets have descended or not; and that is in the nature of an admission, that assets have descended sufficient to satisfy the demand. The only form, which I find, of entering up a judgment against an heir, applicable to a case like the present, is the one in *Tidd's Forms* (a). It was conceded by the counsel for the plaintiff, that, from the time of *William 3*, to the present day, there is not to be found in the books any precedent of a judgment or award of execution, in the form which would be necessary if their argument were correct.

Mr. *Tidd's* book points out, what appears to me to be the proper form in such a case as this: "Therefore, it is considered, that the said *A. B.* do recover against the said *C. D.* his said debt, and his damages aforesaid, to £ , by the said Jury in form aforesaid assessed; and also £ for his costs and charges aforesaid, by the Court of our said Lord the King now here adjudged of increase to the said *A. B.*, and with his assent, *to be levied of the lands and tenements*, which were of the said *E. F.* in fee simple," &c. &c.

I think, therefore, that the statute does entitle the plaintiff to recover the debt, and to recover the damages and costs; but, that the execution is limited to the value of

(a) *Tidd's Forms*, 339, 9th edition.

the lands descended. The plaintiff may, if he be so advised, set out on the record a prayer of execution for his debt, damages, and costs, and the judgment of the Court, limiting the execution to the value of the land, so as to enable him to have our opinion reviewed by a Court of error. My Lord *Lyndhurst* wished, that his concurrence in the judgment of the Court should be stated.

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GARROW, B.—Concurred.

VAUGHAN, B.—I am of the same opinion. This is a liability created by statute, and we are to see whether that liability is not also limited by the same statute. At common law, if the heir had aliened before action brought, the remedy of the creditor was lost. By the fifth section, therefore, it was intended to give an advantage to the creditor which he had not before; and, in the case of an alienation before action brought, the statute makes the heir liable by the words, "shall be answerable, &c.," and then proceeds to define, in distinct terms, to what extent the execution shall go. It says, "execution shall be taken out, &c., to the value of the land," &c. By these words the liability is, therefore, distinctly limited and confined to the value of the lands, &c. Then comes the sixth section, which gives the replication to the creditor, which he had not at common law; and it proceeds to confine the execution on the finding of the jury under such replication, by the words, "as aforesaid;" and that must be taken with reference to the limitation of the execution in the preceding section. The execution, therefore, must be awarded to the extent of the assets only.

Rule absolute.

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BRAITHWAITE and Another v. EDWARD WATTS.

**D**EBT for money had and received, &c.—Plea, *nil debet*.

At the trial, before Lord *Lyndhurst*, C. B., at the *London* Sittings after *Michaelmas* Term last, the following were the facts of the case:

The plaintiffs were the assignees of one *Hopwood*, a bankrupt, and the defendant was one of the committees of *George Watts*, a lunatic. *Hopwood*, in 1828, had obtained a verdict against *George Watts*, in the Court of *King's Bench*; in *Easter* Term, 1828, the *postea* was indorsed on the record, and final judgment signed; and, in *December*, 1828, judgment was entered on the judgment roll. The plaintiffs, after having sued out a *scire facias*, issued a writ of *elegit*, on the 8th *January*, 1831, under which the Sheriff, on the 25th *January*, 1831, delivered to them a moiety of the lands of *George Watts*, the lunatic. The defendant had received 18*l.* 5*s.* 6*d.*, the amount of rent of that part of the lunatic's lands which had been delivered by the Sheriff to the plaintiffs on the execution of the writ of *elegit*. In *May*, 1828, a commission of lunacy had issued against *George Watts*, under which he was found a lunatic from 31st *October*, 1826. On the 16th *June*, 1828, an order was made by the Court of *Chancery*, appointing the defendant, and one *Hannah Watts*, committees of the lunatic's estate and person; and, on the 25th, the usual grant was made to them. In *August*, 1829, an order was made by the Court of *Chancery*, for charging the lunatic's real estate, by way of mortgage, for payment of debts; and, on the 1st of *May*, 1830, the land in question was accordingly mortgaged to a Mr. *Hyatt*, to secure to him the sum of 1400*l.* and interest.

Docketing the issue is not a sufficient docketing of a judgment, within the provisions of 4 & 5 *W. & M.* c.20:—*Held*, that the committee of a lunatic, who had received and paid over rents to a subsequent mortgagee, was not liable in an action for money had and received to a judgment creditor, to whom the land had been delivered by the Sheriff, under an *elegit* sued out upon a judgment prior to the mortgage, of which judgment there was no docket, though the issue had been docketed.

The principal question at the trial was—whether the judgment or the mortgage was entitled to the priority.

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The docket book of the *King's Bench* was produced, in which there was an entry of the cause, from which it appeared that the *issue* was docketed. The entry shewed the number of the roll, but the officer who produced it proved, that it did not follow, from such entry, that there had been a judgment. He said also, that the book in question was the only one produced to persons coming to search for judgments; that, when a judgment followed, they made no further docket without an application from the attorney; that when the judgment is entered up, it refers to the number of the issue roll, and a person searching would be able to find the judgment in the judgment roll; that the entry in question was a *docket of the issue*; that a careful attorney sometimes completed the entry, by bringing the amount of debt and costs to be entered, but that the officer did not make any further entry unless required so to do.

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On this evidence it was contended for the defendant, that the judgment was not docketed according to the provisions of the 4 & 5 *Wm. & M. c. 20*; and, consequently, that the mortgage was entitled to the priority. The learned Lord Chief Baron reserved the point, and the plaintiffs had a verdict, with leave to the defendant to move to enter a nonsuit.

*Jervis*, accordingly, obtained a rule *nisi*; against which cause was now shewn by—

*Kelly and Channell*.—The question is one of extreme importance, as it appears, that the present is the usual way in which the judgments of the Court of *King's Bench* are docketed, and great inconvenience might occur if that mode should now be held to be incorrect. The course is, to docket the issue roll, and then, if the cause go on to

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judgment, when judgment is entered; what was before a docket of the issue, becomes, as the officer said at the trial, a docket of the judgment; and, as it points out to a person making a search, where he may find all the requisite information, the Act of Parliament is substantially complied with. A docket was originally a mere index, invented by the Courts for their own ease and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large (a). The docket in the present instance gave all the information which was necessary to a purchaser.

The exact mode of docketing prescribed by the Act must be considered as directory merely, otherwise the mistake of a letter in one of the names, or the exceeding the exact time for making the entries, would vitiate the whole. Here in effect every thing requisite was done; for, any person searching the docket, in this case, might have ascertained the particulars from the judgment roll to which the docket referred, and to which it was, in effect, an index.

In the *Common Pleas*, the judgments were fully docketed from a very early period; and a rule had been made in the *King's Bench* (b), requiring the plaintiffs' names to be entered alphabetically in a docket in that Court; and the object of the statute was to make the practice of all the Courts uniform in respect to the mode of docketing, and to compel the officers to adopt the same course.

But, at all events, in the present case, the defendant is not in a situation to avail himself of this objection. The committee of the lunatic is exactly in the same situation as the lunatic, and is identified with him; and the judgment debtor clearly would not have been protected by the statute. As to him, the judgment was, at all events, valid and binding. The statute is expressly confined to the protection of mortgagees and purchasers; and this defendant is

(a) Tidd's Prac. 8th edit. 973.

(b) Easter, 1657.

not in the situation either of mortgagee or purchaser, but represents the judgment debtor, and is identified with him. Besides, it was not in evidence that the interest of the mortgage was in arrear.

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*Jervis* and *Addison*, *contra*, insisted, that the judgment was not docketed according to the provisions of the statute, which was compulsory, and that the defendant was not identified with the judgment debtor, but was in quite a different situation from him, and bound in the first instance to pay off the mortgage. And they cited *Pope v. Biggs* (a).

LORD LYNTHURST, C. B.—I am of opinion, that this rule must be made absolute. I think, that it is impossible to contend that this judgment has been properly docketed. In the present case, nothing more than the issue was docketed, and, after the docketing of the issue, no further proceedings as to docketing were taken. If we were to hold this sufficient, it would be saying, that judgments need never be docketed. The mortgagee, then, being entitled to the preference, what was the duty of this defendant? By the authority of the Court of *Chancery*, he was appointed to manage the estate of the lunatic. Now, his first duty would be, to keep down the interest of the mortgages with the money arising from the rents. That, in the first instance, is clearly the proper application of the money. But it is said, that it was not in evidence that any interest was in arrear on the mortgage. It appears to me, that, in the present action for money had and received to the use of the plaintiff, it was not sufficient to shew the receipt of this sum of money for rent, but that it was incumbent on the plaintiff to go farther, and to shew, that it was received to his use—that, after the prior

(a) 9 B. & C. 245.

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liabilities were discharged, such sum remained to his use. He might have shewn that the interest was satisfied, but he has not done so. That part of the plaintiff's case, therefore, was not made out, and I am of opinion that the rule for entering a nonsuit should be made absolute.

BAYLEY, B.—The third section of the statute in question enacts, that no judgment not docketed and entered in the books, *as aforesaid*, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's estates. We are then to see whether this judgment has been docketed and entered within the meaning of the words "*as aforesaid*" in the 3rd section. Now, the mischief which is recited by this statute, and which it was the object of the enactment to remedy, was "the difficulty of finding out such judgments;" and, to remedy that mischief, the officers of the particular Courts are directed by the second section "to make, or cause to be made, and put into an alphabetical docket, by the defendant's name, a particular of all judgments by confession, &c., &c., which shall contain the name and names of the plaintiff and plaintiffs, the name and names of the defendant and defendants, his, her, or their place or places of abode, &c., if such be in the record of the judgment, and the debt, damages, and costs recovered thereby, and in what county, &c., the respective actions were laid, and the number-roll of the entry thereof. . This applies to judgments by confession or default, and then comes a provision for the making of similar dockets in the case of judgments upon verdict, writ of inquiry, and demurrer, as to which the statute directs the particular officers mentioned to carry in notes in writing, from which the officers, whose duty it is, may make out the dockets. In the present case, there was a docket of the issue and not of the judgment, and one from which

no man can tell whether or no there ever was a judgment. Now, if the judgment be not docketed, the mortgage made subsequently is a good and valid conveyance, and passes the property in question. If the property was conveyed to the mortgagor, it is difficult to see in what respect the *elegit* could operate as against a third party entitled to the legal estate. Even, if the rents had been received by the judgment debtor, I should have had great difficulty in saying that this action would have been sustainable against him; but the present defendant, as his committee, is not identified with him, but is in a very different situation from him. He is not the agent of the lunatic, or appointed by him. The care of the lunatic's estates being vested in the King, as *parens patriæ*, the Court of *Chancery* has the direction of them, and the defendant is the committee under the authority of that Court. Then, upon an application to the Court of *Chancery*, the estates are mortgaged for the sum of 1400*l.* There is then, at all events, 70*l.* a year to which the defendant is bound first to attend. It is not necessary for us to decide whether, after satisfying that amount, he would be justified in paying over the residue to the present plaintiffs without the authority of the Court of *Chancery*; but the defendant was clearly bound to keep down the interest of the mortgages in the first instance. It has been said, that the rents were more than adequate to keep down the 70*l.* But have these rents been received? There is only evidence of 18*l.* 9*s.* 6*d.* having been received, and that sum the defendant was bound to pay over to the mortgagee. I am, therefore, of opinion, that the plaintiff's case was not made out, and that a nonsuit should be entered.

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GARROW, B.—The act did not intend that the docket should be a mere index, by which you can find some other document in which you may search for the debt and damages and other information. I think, that this judgment

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was not docketed within the provisions of the act of Parliament, and, therefore, that a nonsuit should be entered.

VAUGHAN, B.—This is an action brought by the representatives of a judgment creditor, insisting, that the defendant has received the rents of the land in question to their use. One question is, whether this judgment has been properly docketed. I think the act of Parliament is a most wholesome statute, and that its provisions ought not to be frittered away. The object is plain, from the preamble; it is, that parties should have access to such plain and distinct information as should enable them to judge whether they are safe; and, therefore, the act requires that the names of the parties to the action, the description of the defendants, if on the record, and the debt, damages, and costs, should all be mentioned in the docket. The statute does not say that a judgment not so docketed shall be void, but it says distinctly that it shall not affect subsequent purchasers or mortgagees. Now, according to the evidence of the officer at the trial, this is not a docket of the judgment, it is nothing more than a docket of the issue, unless the amount of the debt, &c., be brought in and entered upon the roll. I am, therefore, clearly of opinion, that this judgment can have no effect against a subsequent mortgagee.

Then, was the money received to the use of the plaintiff? It was the defendant's duty to keep down the interest on the mortgage in the first instance, and only about a quarter's interest on the mortgage was proved to have been received. It seems to me, therefore, that the action fails, and that a nonsuit should be entered.

Rule absolute.

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## FOX v. MAHONEY.

**T**ROVER, by the assignees of a bankrupt, to recover the value of a quantity of articles deposited with the defendant by the bankrupt.

At the trial, before Lord *Lyndhurst*, C. B., at the *London* Sittings after last *Hilary* Term, the conversion proved was after the act of bankruptcy. The property had been deposited with the defendant for a special purpose, and converted by him in breach of the bailment; so, that the bailor might have sued, if he had not become bankrupt. The bankruptcy was proved by the depositions and proceedings only. The defendant having obtained a verdict—

The depositions are conclusive evidence under the 92nd section of 6 *Geo.* 4, c. 16, in a case where the bankrupt might have sued, if no bankruptcy had ensued, though the conversion which gave the right of action took place after the act of bankruptcy.

*John Williams*, in this term, obtained a rule for a new trial, as on a verdict contrary to evidence, against which—

*R. V. Richards* shewed cause; and, after commenting on the evidence, objected, that no new trial could be granted, as the defendant was entitled to succeed, on the ground of no sufficient evidence of the plaintiff's title to sue as assignees having been given; and he argued, that the depositions, &c., were not evidence in this case, as the bankrupt himself could not have sued, the conversion not having taken place before his bankruptcy; and he urged, that the words of the statute 6 *Geo.* 4, c. 16, s. 92, "for any debt or demand for which the bankrupt might have sustained any action or suit," clearly shewed that the 92nd section was not intended to apply to a case where the right of action never vested in the bankrupt, and he never had the power of suing, and never could have "sustained any action or suit."

*Williams, Archbold, and Kelly, contra.*—The bankrupt might, in this case, have sustained an action, if there had been no bankruptcy. The object of the statute was, to make a party safe in paying, where the debt must be paid

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to somebody. In a following section, the debtor, who pays, is protected even after the commission is superseded. The defendant, in such case, has no interest as to whether he pay the amount to the plaintiff or to the assignees. There is nothing, either in the letter or the spirit of the enactment, to confine it to the case of a transaction wholly happening before the bankruptcy; and the object of the statute applies to cases happening as well before as after. There are no words in the statute to limit its operation as contended for; it is not said, *which shall have accrued before the bankruptcy*, but the words are, “for which the bankrupt might have sustained, &c.” The sentence is incomplete; but it obviously means, for which he could have sustained, &c., if no commission had issued, or bankruptcy taken place. It was the intention of the Legislature, by the words in question, to exclude cases like those of fraudulent preference. In a case like the present, the bankrupt could have sued, if there had been no bankruptcy; but, in a case of fraudulent preference, he could not, as such preference, though void as against his assignees, would be good as against himself. The cases, therefore, which have arisen as to questions of fraudulent preference, have no bearing upon the present. There is no difference in principle, whether the right of action has arisen before or after the time of the act of bankruptcy. In neither case does the act of bankruptcy prevent the bankrupt from recovering, unless a commission be taken out.

[They then proceeded to argue the other questions arising on the evidence.]

Lord LYNTHURST, C. B.—I am of opinion that there ought to be a new trial. With respect to the 92d section of the 6 Geo. 4, c. 16, I think that the true construction has been put on that enactment by the counsel for the plaintiff; and I am of opinion that the intention of the Legislature was, that, in cases where, in the event of there

being no bankruptcy, the bankrupt could have maintained an action, and where no such notice as is prescribed in the section has been given, the depositions should be received as conclusive evidence; and I think so, on the ground stated at the bar, that if the defendant is not bound to pay the assignees, he is bound to pay the bankrupt; and that, by a subsequent clause in the Act, he is discharged by such payment from any future claim, although the commission should be afterwards superseded; and, therefore, I am of opinion, that the true construction has been put upon that clause.

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The rest of the Court concurred, and a new trial was granted, on payment of costs, as on a verdict against evidence.

Rule absolute.

#### GRAHAM v. BROWNE.

**K**ELLY had obtained a rule *nisi* for entering a suggestion on the roll, to deprive the plaintiff of costs, pursuant to the statute 45 Geo. 3, c. 67, passed for establishing a Court of *Requests* in the city of *Bath* and the liberties thereof. It appeared, that the action was brought against the defendant as acceptor of a bill of exchange for 8*l.* 16*s.*, dated *London*, and indorsed by one *King* the drawer, who lived in *London*, to the plaintiff, who also lived in *London*, for a debt arising in *London*, and accepted payable at a *London* banker's.

The defendant resided at *Bath*, within the jurisdiction of the Court of *Requests* there. The plaintiff obtained a verdict at the *London* sittings after last *Michaelmas* Term.

A defendant residing in *Bath*, against whom a verdict for less than 10*l.* has been recovered, is entitled to enter a suggestion on the roll, to deprive the plaintiff of costs, under the 45 Geo. 3, c. 47, although the plaintiff resides in *London*, and the cause of action has not arisen within the jurisdiction of the *Bath* Court of *Requests*, established by that Act.

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*John Williams and Comyn* shewed cause.—The case of *Baildon v. Pitter* (a) requires reconsideration. It could not be intended by the Legislature, that a plaintiff residing at any distance should be obliged to come to *Bath* to have recourse to this jurisdiction; but the enactment must be intended to apply to the city of *Bath*, and to those adjacent districts only, which are by this Act, and the 6th Geo. 3, placed within the jurisdiction of the local Court. This appears from the recital of the Act, which shews the mischief which it was intended to remedy. The Act begins with reciting, that *Bath* and the adjacent districts were connected in trade; that the inhabitants were much increased, &c.; and, that the said city of *Bath* and the other parishes and places were situate at the extremity of the county of *Somerset*, and at a distance from the Assize town, 'so that the inhabitants of the city, and the other parishes and places, were obliged, for the purpose of recovering small debts at the Assizes, to travel, with their witnesses, nearly sixty miles: and it then proceeds to state, that it would be beneficial to extend the powers and provisions of the former Act, and, also, to extend the limits of the jurisdiction to the other places mentioned in the Act.

This being then the object of the Act, the proper construction of it is, that, on the inhabitants of *Bath*, and the extensive districts placed within the jurisdiction of the Court, the Act should be compulsory; but it could never be intended, that a plaintiff, residing in *Cumberland* (for instance), should, for a cause of action arising in that county, be obliged to come personally to *Bath*, to make his application in person before the Commissioners under this Act.

Suppose a person, residing usually in *Bath*, commit a trespass, when he is on a journey in *Cumberland*, it is

(a) 3 B. & A. 210.

monstrous to require a plaintiff to come to *Bath* to obtain redress.

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[*Bayley, B.*—There is an express power (a) given to plaintiffs, reside where they may, to sue in the Court of *Requests*; and then the 47th clause takes away costs from parties who have sued in any other Court whatsoever, for a debt recoverable in the said Court of *Requests*.]

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There is no power to subpoena persons out of the jurisdiction of the Court, and that is an argument to shew, that the Act was intended to be confined to *Bath* and the adjacent districts. The sixteenth section mentions actions of trespass; now, it could never be intended, that the Court should have a jurisdiction over a local action of trespass beyond the limits of the jurisdiction.

[*Lord Lyndhurst, C. B.*—The words are, “actions of trespass, or detinue for taking goods;” and, therefore, the enactment is confined to cases of trespass *de bonis asportatis*, which is a transitory action.]

Plaintiffs residing out of the jurisdiction are *allowed* to resort to the Court; but it does not follow, that they are *compelled* to do so.

*Kelly*, in support of his rule, was stopped by the Court.

LORD LYNTHURST, C. B.—I can see no difficulty in the construction of this Act of Parliament, whatever may be said of its policy. The clause takes away the costs in any cause of action recoverable in the local Court; and by the former clause, plaintiffs, wherever resident, may sue there.

BAYLEY, B.—We felt the hardship in the case in the Court of *King's Bench*; but we could see no other mode of construing the Act. The one clause takes away the costs, where a party sues in another Court in a cause of

(a) Sect. 22.

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action recoverable in the *Bath Court of Requests*; the other enacts, that the debts shall be recoverable there, though the plaintiff reside out of the jurisdiction. Under these circumstances we are bound by the plain words of the statute.

VAUGHAN, B.—We should be repealing this Act of Parliament, if we were to put upon it the construction contended for on the part of the plaintiff.

Rule absolute.



ILSLEY, Executor, v. ILSLEY.

The Court will not order a bail bond to be delivered up to be cancelled, on the ground that the process is general, and the affidavit to hold to bail, as executor.

THE affidavit of debt in this case was made by the plaintiff as executor. The process was general.

*Chilton*, upon the ground of this variance, obtained a rule to shew cause, why the bail bond should not be delivered up to be cancelled. He referred to *Tidd's Practice* (a), where it is said, that “in actions *notailable*, if the plaintiff sue *qui tam*, or as executor, or administrator, or assignee of a bankrupt, &c., the process need not state the special character in which he sues;” and argued, that the inference was, that in *ailable* process, where the plaintiff sues in a special character, it must be stated.

*Ball* shewed cause.

In support of his rule, *Chilton* contended, upon the authority of *Spalding v. Mure* (b), *Stables v. Ashley* (c), and *Chapman v. Eland* (d), that the variance was sufficient to

(a) Page 147.

(b) 6 T. R. 363.

(c) 1 B. & P. 49.

(d) 2 N. R. 82.

deprive the plaintiff of his bail; and endeavoured to distinguish the case of *Ashworth v. Ryal* (a), which was mentioned by Mr. B. Bayley in the course of the argument, from the present, by observing, that there the affidavit of debt was not made by the plaintiff as executrix.

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BAYLEY, B.—In the case of *Ashworth v. Ryal*, Mr. Archbold, as *amicus curiæ*, stated the correct rule, *viz.* that upon general process the plaintiff may declare *qui tam*, or *in autre droit* as executor (b); which rule was adopted and acted upon by the Court. It is said, that that case is distinguishable from the present, because, in *Ashworth v. Ryal*, the affidavit was not made by the plaintiff as executrix. It is not so stated in the report, but it must have been so made, otherwise there would have been a variance between the affidavit to hold to bail and the declaration. That case is, therefore, decisive of the present.

*Per Cur.*

Rule discharged.

(a) 1 B. & Adol. 19.

(b) See *The Weavers' Comp. v. Forrest*, 2 Str. 1232.

### HANLEY v. MORGAN.

THE defendant, as acceptor of a bill of exchange, was arrested by the plaintiff, as indorsee, upon an affidavit, which stated, that the defendant was indebted to the plaintiff in the sum of 263*l.* 15*s.* as indorsee of a bill of exchange, drawn, &c., and accepted by the defendant, &c., but did not disclose the sum for which the bill was drawn.

It is not necessary, in an affidavit to hold to bail on a bill of exchange, to express the sum for which the bill was drawn.

*Channell* moved for a rule to shew cause, why the bail bond given by the defendant should not be delivered up

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to be cancelled, and referred to the precedents in *Tidd's Forms* (a).

BAYLEY, B.—Entertained a doubt, whether it was not sufficient to allege in the affidavit, that the defendant was indebted to the plaintiff in a sum certain upon a bill of exchange, without stating the amount for which the bill was drawn; but, nevertheless, granted the application, that the question might be further considered. Upon a subsequent day he stated that, having looked into the authorities upon the subject, his first impression was confirmed, and the rule would probably be discharged—

Upon which *Channell* elected to take

No rule.

(a) Page 79.

#### LEYLES v. CHETWOOD.

Affidavits to found a motion to stay proceedings upon a bail bond, may be intitled either in the original action, or in the action against the bail.

**SAUNDERS** having obtained a rule to stay proceedings in an action against the bail on the bail bond, the clerk of the rules refused to draw it up, because the affidavits were intitled in the action against the bail. The affidavits were accordingly amended, and *Saunders* renewed his motion, and mentioned the objection.

BAYLEY, B.—The affidavits would be well intitled in either action (a).

(a) See *Ham v. Philcox*, 1 Bing. 304; *Kelly v. Wrother*, 2 Chit. 142; *Robert v. Giddins*, 1 B. & P. Rep. 109. 337; *Webb v. Mitchell*, 1 Tidd,

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## NOLLEKEN v. SEVERN.

**ON Tuesday**, the 17th *January*, notice of declaration was given to the defendant, indorsed to plead in eight days. On *Saturday*, the 21st, he pleaded without having entered an appearance, whereupon, on the same day, the plaintiff treated the plea as a nullity, and signed judgment.

A plea pleaded irregularly, does not entitle the plaintiff to sign judgment before the time for pleading has expired.

*Follett* having obtained a rule to set aside the judgment for irregularity—

*Archbold* shewed cause.—The defendant having pleaded before entering an appearance, the plea may be treated as a nullity, and judgment may be signed; because, where the plea is a nullity, either in respect of the mode of pleading, or the form of the plea, it operates as a waiver as to time. *Lockhart v. Mackreth* (a), *Perry v. Fisher* (b).

[Lord *Lyndhurst*, C. B.—Are there any cases which decide, that where the party pleads before the time for pleading has expired, and the plea is a nullity, it operates as a waiver as to time?]

*Brandon v. Pyne* (c), is an authority to that extent.

[*Bayley*, B.—That case only determined, that the defendant, by pleading in abatement after the four days, dispensed with a rule to plead.]

*Follett, contra*.—A plea pleaded before entering an appearance, is not such a waiver as will entitle the plaintiff to sign judgment before the time for pleading is out.

BAYLEY, B.—The judgment was signed too soon; and, therefore, I am of opinion that this rule ought to be made absolute.

The rest of the Court concurred—

Rule absolute (d).

(a) 5 Term Rep. 663.

(b) 6 East, 549.

(c) 1 Term Rep. 689.

(d) There was a dispute about the facts, and the rule was pronounced conditionally.

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A power of sale, in a settlement, over-riding estates in fee, to be exercised (by the trustees in whom the estates were vested in fee), with consent of tenant for life, during his life, and, after his death, at the discretion of the trustees for the time being, is a valid power to be exercised by the original trustees during the life of the tenant for life.

THE following case was sent by his Honor, the Master of the Rolls, for the opinion of this Court.

The plaintiff, *Edward Williams*, being seised of or well entitled to a messuage, hereditaments, and premises, called *Shortridge*, situate in the parish of *Brickland*, certain indentures of lease and release, bearing date on or about the 18th and 19th days of *December*, in the year 1828, the latter made between the plaintiff *Edward Williams*, of the first part, the plaintiff *Susannah*, now his wife, of the second part, and the plaintiffs *Henry Boyce* and *George Mill*, of the third part, were duly executed by all the said parties, whereby the said plaintiff, *Edward Williams*, did convey unto the said plaintiffs *Henry Boyce* and *George Mill*, and their heirs, the said messuage and tenements, hereditaments and premises, to hold to them and their heirs, to the uses following, (*viz.*) until the solemnization of the then intended marriage (between the said *Edward Williams* and *Susannah*) to the uses then subsisting therein; and after the solemnization thereof (and which event hath happened), to the use of the said *Edward Williams* and his assigns during his life, without impeachment of waste; with remainder to the use of the said plaintiffs *Henry Boyce* and *George Mill* and their heirs, during the life of the said *Edward Williams*, in trust, to preserve contingent remainders; and after the decease of the said plaintiff, *Edward Williams*, then to the use, intent, and purpose that the said plaintiff *Susannah*, his wife, if then living, might receive the yearly charge of *25l. per annum* for her life, and, subject thereto, to the use of all or such one or more, (exclusively of the other or others of the children or remoter issue of the said plaintiff, *Edward Williams*, by the said plaintiff, *Susannah* his wife), at such times, for such estates and interests, as the said *Edward Williams* and *Susannah* his wife should, as therein mentioned, jointly appoint; and, in default of such

joint appointment, then as the survivor of them should in manner therein mentioned appoint; and in default of such appointment, and subject thereto, to the use of all the children of the said *Edward Williams* by the said *Susannah* his wife, their heirs and assigns for ever, in equal shares, as tenants in common; and, if any one or more of such children should die under the age of twenty-one years, without leaving issue, then, as to the share or shares of the child or children so dying, as well original as accruing by virtue of that provision, to the use of the other or others of the said children, and his, her, or their heirs and assigns for ever, if more than one, in equal shares, as tenants in common; and, if there should be no child of the said *Edward Williams* by the said *Susannah* his wife, or, being such, if he, she, or they should die under the age of twenty-one years, without leaving issue, then to the use of the said plaintiff, *Edward Williams*, his heirs and assigns for ever. And in the said indenture of release there is contained a power for the said *Edward Williams*, during his life, and, after his death, for the trustees or trustee for the time being, during the minority of any child or children of the said marriage, who, by virtue of the limitations therein, should be entitled to any estate of inheritance in the said hereditaments, to lease all or any part of the said hereditaments for any term not exceeding twenty-one years; and a further power, which, so far as it is material, is in the words and to the purport and effect following; that is to say—" Provided further, that it shall be lawful for the trustees or trustee for the time being, with the consent in writing of the said *Edward Williams* and *Susannah Mill*, or of the survivor of them, and, after the decease of such survivor, at the discretion of the trustees or trustee for the time being, to sell all or any part of the said hereditaments hereby appointed, granted, and released, to any person or persons whomsoever, not excepting the said *Edward Williams* and *Susannah Mill*, for such price as to such trustees or trustee shall seem reasonable; and, for effecting such

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sale by any deed by them or him legally executed, to revoke all or any of the uses, trusts, powers, and premises herein declared and contained concerning the hereditaments so sold; and by the same or any other deed so executed, to appoint any new uses, trusts, or estates thereof." And by the said indenture it was provided, that the trustees or trustee for the time being should apply the money to arise by every such sale, in or towards satisfaction of the principal sums of money (if any) then a charge upon the said premises, and to invest the surplus in the purchase of other freehold, leasehold, or copyhold hereditaments, to be settled to the same uses and under the same powers as are therein contained concerning the hereditaments so sold, and, until the money should be so applied, to invest the same in Government or real securities. And by the said indenture it was further provided, that, after the decease of the said *Edward Williams*, and until his child or children by the said plaintiff, *Susannah* his wife, should be of the age of twenty-one years, the said trustees or trustee should apply the yearly rents and profits of the said hereditaments for or towards their maintenance and education; and that it should be lawful for the said trustees or trustee for the time being, after the decease of the said *Edward Williams*, or, in his lifetime, with his consent in writing, to raise out of the said hereditaments such sum as therein mentioned, for each such child as aforesaid, and the issue of such child, and to apply the same for their advancement during their minority, as therein mentioned. And it was further provided, that the receipts of the trustees or trustee, for any money payable to them or him under the provisions thereinbefore contained, should effectually discharge the persons paying the same. And it was by the said indenture further provided, that, as often as any of the present or subsequent trustees, or their or his heirs, executors, administrators, or assigns should die, or decline, or become incapable to act, it

should be lawful for the said *Edward Williams*, during his life, and, after his decease, for the said *Susannah* his wife, if living, and, after the decease of both of them, then for the surviving or continuing trustees or trustee, or his or their executors or administrators, by deed to appoint any new trustee or trustees; and all the trust estates then subject to the trusts aforesaid, should be thereupon effectually vested in such new trustees or trustee, either solely or jointly with the surviving or continuing trustees or trustee, as occasion should require, to the uses and upon the trusts thereinbefore declared, or such of them as should be then subsisting; and that every new trustee should have all the powers of the trustee in whose room he should be substituted.

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The plaintiffs had, under the power of sale before set forth, contracted with the defendant for the sale to them of the before-mentioned messuages and premises. The question for the opinion of the Court was, whether, under the said power of sale, the plaintiffs *Henry Boyce* and *George Mill*, with such consent of the other plaintiffs as required by the said power, could sell and make a valid assurance of the said premises to the said defendant?

*W. Rogers*, for the plaintiffs.—The question is, whether the power of sale given to the trustees, or rather the grantees to uses, is void, by the rule against perpetuities. It may be conceded that a power of sale unrestricted to the limits of the rule as to perpetuities, and overriding an estate in fee, is void. The older settlements where estates tail are introduced are free from the objection, because the children can bar the estate tail, and get rid of the effect of the power by suffering a recovery; but in many modern settlements it has been thought preferable to give the children a fee, and to insert general powers of sale; and those settlements are not guarded against the question

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of the powers of sale violating the rules against perpetuities; and, therefore, the point raised in this case is one of great importance. It is said, where the limitation is to the children in fee, that as they cannot get rid of the power by suffering a recovery, the power is void; but it should be observed, that a *power of sale* does not seem to be within the mischief intended to be prevented by the rule against perpetuities, as in the ordinary case of a springing use or executory devise, for in effect such a power assists alienation instead of preventing it. But it is submitted that in the present case the power is divisible and good *pro tanto*. It is in the nature of two distinct powers; *first*, one for the life of the tenant for life, and to be executed with his consent, that is in effect by the tenant for life. And *secondly*, a distinct power to the trustees after the death of the tenant for life without consent. No question arises at present on the *second* branch. An instance of a similar division of a general power occurs where the limitation is to the children in tail, for it has never been supposed for a moment that the power would be good after the extinction of the estate tail (a). So, in the present case, it may be good during the life of tenant for life, and bad after his decease. During the life of the tenant for life the power is to be executed with consent, as provided by the deed. If the power stopped there, no doubt could be entertained but that it would be good; why then should it not be good to that extent at all events, whether good or not afterwards? The power may also be divisible as to the persons to whom it is given, that is to say, it may be good as to the person to whom it is given, and bad as to his heirs. The question now raised has never been decided. The case of *Ware v. Polhill* (b) will be relied on for the defendants—that was a case in

(a) Prest. Abstracts, 158.

(b) 11 Ves. 257.

which leasehold estates were bequeathed in trust to pay the rents and profits to the persons for the time being entitled under the limitations of real estate devised in strict settlement, with power to the trustees at any time with consent of the persons so entitled, or, if minors, at their own discretion, to sell and invest the produce in real estate to the same uses; and the Lord Chancellor held that the power was bad. In that case, however, the first tenant for life being dead, the question was, whether such power could be executed after the death of the tenant for life, the grandchild being entitled to the *absolute* interest in the leaseholds, which, being limited, so as to create an estate tail in real estate, vested absolutely in the *quasi* tenant in tail? The Court said, that being bad to the extent in which it was given, you cannot model it to make it good; which was quite true when the absolute interest had vested. The question, therefore, has never been decided, and is now for the first time to be adjudicated upon; and, therefore, in the absence of authorities, it must be decided upon principle. The doctrine, contended for on the part of the plaintiffs, is to be found in *Sugden on Powers* (a). That learned author comes to the conclusion, that, instead of tying up property, such a power enables the alienation of property.

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[*Bayley, B.*—It enables the trustees to sell, but the owner in fee, who would otherwise be able to sell, is incapacitated.]

*Routledge v. Dorrell* (b), shews that a power may be good and bad according to the objects of the appointment, that is, good as to the objects within the limits of the rule as to perpetuities, and bad as to objects beyond those

(a) Page 146, 3rd edit.; and see the explanation of *Ware v. Polhill*, *Ibid.* 145, 146.

(b) 2 Ves. jun. 357; and see *Sug. on Powers*, 147.

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limits. There the power was to appoint to children, grandchildren, or *issue*, so that it would apply to some objects within, and to some without, the line of perpetuities. The Court held, that the power was good as to such issue as were within the line. That then was a power to do something within and something without the line of perpetuities; and, though not precisely the present case, it shews that a power is divisible so as to be good in one respect and bad in another. In the present case, the power may well be divided into two distinct powers, the boundaries of which are clearly defined by the life or lives of the tenant or tenants for life.

But even if a power of this nature cannot be divided in the manner contended for, still the power is given to the trustees or trustee for the time being, and not to the parties *nominatim*, and therefore exists only during the trust; and from the whole provisions of this instrument, it may be gathered that the power in the trustees was intended to be confined to the life of the tenant for life and the minority of the children, so as to be within the limits of the rule in question. There is no one purpose of the instrument for which the trustees are to do any act whatsoever after the termination of the minority of the children. So, in *Doe v. Harris* (a), where a power to sell "at any time after my death," was given to the trustees, the Court of *King's Bench* held, that the power of the trustees was limited to the minority of the infants, during which only they had duties to perform. The power there was as general as it well could be, but being for the benefit of the children, it was held to last only during their minority. Now, in the present case, the children are to take absolutely at twenty-one; and, therefore, there is no interest or power in the trustees after that period.

(a) 2 D. & R. 36.

[Lord *Lyndhurst*, C. B.—Suppose a child died before twenty-one leaving issue.] *Exch. of Pleas,*  
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Such issue would take in fee, the estate would remain in him without any trust remaining. The trust would be at an end; that is the effect of *Doe v. Harris*.

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[*Bayley*, B.—In that case there was an express limitation to the trustees until a particular period, that is, until the children obtained their age of twenty-one years.]

Powers of this description must be limited according to the duration of the estate and interest of the party who has the power, and according to the object of the trusts of the instrument.

In the case of a power over-riding an estate tail, it has never been supposed that the power continues after the estate tail is barred. It is said by the defendant, that there is a power of appointing to the issue, which may create estates and trusts to have duration beyond the minority of the children. But the answer to that is, that the plaintiff's power of appointing in that manner, in the present case, would be put an end to by his concurring in this sale, or, in fact, will never be capable of being executed as to the property now in question.

There was formerly a doubt whether a power to appoint to children, was not in the nature of a trust, so as as not to be capable of being released. In *Smith v. Death* (a), the Vice-Chancellor supported the doctrine that such a power might be extinguished; and though that decision has been doubted, the latest decision has supported it (b).

By concurring in the present sale, there would be an extinguishment of the power of appointing to the children, so as to create any estate or trust having duration beyond the minorities.

(a) 5 Mad. 371.

(b) See *Badham v. Mee*, 7 Bing.

695; *West v. Burney*, 1 Russ. & Myl. 431; *Bickley v. Guest*, Id. 440.

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*Preston* for the defendants.—In *Routledge v. Dorrill*, the Court did not say that there were two distinct powers, or that the power could be divided, so as to be good as to one part, and bad as to the other; on the contrary, the Court decided in that case that the power was valid *in toto*, but that the execution of it in favour of the issue, beyond the line of the rule of perpetuities, was bad. It was decided in *Routledge v. Dorrill*, that the appointment to the children or grand-children was good, but that it was bad to the tenant for life, unborn at the date of the instrument creating the power, with remainder to unborn issue as purchasers, because every execution of a power takes effect, as if the limitations under it were contained in the instrument creating the power. The power in *Routledge v. Dorrill* was admitted to be good; the question was, whether the execution was good in part.

In *Doe v. Harris*, there was no question as to the validity of a power. The simple question in that case was, whether, in point of construction, the legal estate was or was not in the trustees. The Court was of opinion that it was not in the trustees; and to meet the objection taken, they said that the *powers* were limited by the express devise of the freehold, but no question arose as to the powers being good or bad.

The argument for the plaintiff, that the power of appointment to the children and issue would be destroyed, and with it the power of creating estates or trusts, which would endure beyond the minorities of the children, to which it is contended the trusts are confined, depends upon *Smith v. Death*, which cannot be supported; Lord *Eldon* and Lord *Redesdale* have both expressed their surprise at it. The Court of *Common Pleas* decided *Badham v. Mee* on the authority of *Smith v. Death*.

Suppose, in the present case, that the tenant for life died, leaving children who die under twenty-one, leaving infant

issue, the words of the power would clearly extend to such a case; the case might be carried further by supposing another generation; but it is sufficient for the present argument to put the case of two minorities, which might keep up the power beyond a life or lives in being and twenty-one years.

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The case resolves itself into this simple point, whether a limitation of one such power can be split into two, that is, one to be executed during the lives of the husband and wife, the other after their death.

Why are the lives to be the measure of such a power? no distinct estate or power during those lives is given to the trustees, but their power is one power under one limitation; and the assent of the husband and wife or the survivor being required during their lives, and after their death the discretion being vested in the trustees, are only modifications of the way in which the same power is to be executed at different periods. In *Ware v. Polhill* (a), Lord Chancellor *Eldon* said, that upon further consideration, as to the leasehold estates, he thought that power of sale was void, for it might travel through minorities for two centuries. And if it was bad to the extent in which it was given, you cannot model it to make it good.

In *Lord Southampton v. The Marquis of Hertford* (b), the Master of the Rolls said—"I do not see how any part of such a trust can be executed;" and, in commenting upon *Ware v. Polhill*, he observed, that the Chancellor "held the power of sale to be void, upon the ground that it might travel through minorities for two centuries;" and added, "if it is bad to the extent in which it is given, you cannot model it to make it good."

These cases shew that the whole power is bad, and did not proceed on the ground of the execution being bad.

(a) 11 Ves. 257.

(b) 2 Ves. & B. 64.

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In *Bristow v. Boothby* (a), the power was bad, because it did not correspond with the estate. There was an interest beyond the estate tail. If the power had been to take effect at the expiration of the estate tail, it would have been good, but being to take effect after a general failure of the issue of the marriage, there being no limitation to the daughters of sons, it was too remote, and could not be made good in the event. It is impossible, without a very forced construction, to split the power in the present case into two; and, if that cannot be done, it is clearly void, as being within the line of the rule against perpetuities.

*Rogers* was heard in reply.

*Cur. adv. vult.*

The following certificate was afterwards sent:—

“ This case has been argued before us. We have considered it, and are of opinion, that, under the said power of sale, the plaintiffs, *Henry Boyce* and *George Mill*, with such consent of the said plaintiffs as required by the said power, can sell and make a valid assurance of the said premises to the said defendant (b).

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J. BAYLEY.  
J. VAUGHAN.”

(a) 2 Sim. & Stu. 465.

(b) See Prest. Abstracts, 158.

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## NOTTS v. CURTIS.

**THE** defendant obtained a rule *nisi* to change the venue from *Lincoln* to *Nottingham*.

*Miller* now shewed cause, on an affidavit stating that the defendant had previously taken out a Judge's order for further time to plead, "on the usual terms." *Tidd's Practice* (a) and *Dax's Practice* (b), *Waring v. Holt* (c), and *Brettargh v. Dearden* (d), shew, that the defendant cannot change the venue after an order for time to plead "on the usual terms." This is a general rule, and does not depend on the question whether a trial would be lost. In *Waring v. Holt*, this Court refused to make an order to change the venue, notwithstanding there was an offer made to give judgment of the term.

The defendant cannot change the venue after an order for time to plead, "on the usual terms," either in town or country causes, whether the trial will be delayed or not.

As the defendant in a country cause, where the plaintiff could not be delayed, might have had special terms inserted in the order for time to plead, so as to save his right to apply to change the venue; the Court, on an order for time to plead, on the usual terms, being shewn for cause against a rule to change the venue, allowed the order to be amended, by the insertion of such special terms, on payment of costs.

*Power, contra.*—The rule, as stated in the books of practice, is too general, and does not apply to country causes. The authorities all relate to town causes, and no authority can be found which goes to the extent that "the usual terms" imply an undertaking not to change the venue, where the effect of doing so would not be to delay the plaintiff's judgment. *Waring v. Holt* was decided on the principle, that the change of venue would delay the plaintiff, as is apparent from the argument. So also, in *Brettargh v. Dearden*, the effect of changing the venue from *Middlesex* to *Lancaster* would have been to postpone the trial from *Hilary* Term until the *Lent* Assizes.

**LORD LYNTHURST, C. B.**—Although the cases referred

(a) Page 609.

(b) Page 60.

(c) 3 Price, 3.

(d) M'Clel. & Young, 106.

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to by Mr. *Tidd*, and collected in the other books of practice, are cases of town causes, the Court, in the case of *Waring v. Holt*, laid the rule down as a general rule; and it appears always to have been so understood in this Court. It is of great importance that such rules should be strictly adhered to, for otherwise, it would be impossible to regulate the practice. If any inconvenience was likely to arise in the present case, the defendant had the remedy in his own hands, for he might have drawn up the order specially, and inserted the words "without prejudice to an application to change the venue." The omission of those words makes the objection good; but, as the plaintiff will not be delayed, we may direct the order to be amended in that respect.

BAYLEY, B.—In deciding what shall be done in this case, we may look to the reason of the rule, as well as to the rule itself. Had the defendant applied, on drawing up the order, to introduce the special words, he would have been allowed to do so, as a matter of course; but, as no mischief or delay can result from changing the venue in this case, I think the order may be amended.

The order was accordingly amended, on payment of costs, and the rule to change the venue was made

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**THE ATTORNEY-GENERAL v. MUNDAY.**

**THIS** was an application on behalf of the Commissioners of Stamps, to refer the bill of a clerk in Court back to the King's Remembrancer, to review his taxation. The questions were, whether the clerk in Court was entitled to charge a term fee in a prosecution at the suit of the Attorney-General, where only a *subpœna ad respondendum* had issued, without any information being filed or other proceedings afterwards taken; and, *secondly*, whether the term fee of the clerk in Court, in a revenue cause, ought to be 6s. 8d. or 3s. 4d.

A clerk in Court is entitled to charge a term fee in a revenue prosecution, at the suit of the Attorney-General, where only a *subpœna ad respondendum* issues, without any information or other proceeding being had.

The term fee of a clerk in Court, in a revenue prosecution, is 3s. 4d., and he cannot charge 6s. 8d.

The affidavit on the part of the Crown stated, that, neither in the Office of Pleas in this Court, nor in any of the other superior Courts at *Westminster*, was any term fee allowed to the attornies, solicitors, or clerks in Court, in any action or suit, upon the mere issuing of process only, without the filing of a declaration at law or bill in equity.

The affidavit for the Crown then stated, that a term fee of 3s. 4d. only was taken by all the clerks in Court in the *King's Remembrancer's Office*, from time immemorial until about the year 1807, at which time some of the clerks in Court began to claim 6s. 8d.; but that, for business in the excise and customs departments, the clerks in Court employed by those departments have always, to the present time, claimed and received 3s. 4d., and no more. The affidavit then stated, that the commissioners for examining into the salaries of the officers of the Courts of justice, by their report, dated 9th *February*, 1822, reported that, in the years 1730 and 1731, lists of fees claimed by officers of the Courts of *Exchequer* and *Exchequer Chamber* were returned to the House of Commons; and presentments respecting the fees of such officers were made in 1735 and 1736, by jurors under the commission for inquiry into Courts of justice, appointed in 1732.—That the com-

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missioners, in 1822, further reported, that, in 1807, the Lord High Chancellor, with the assistance of the then Master of the Rolls, revised the fees of the sworn and waiting clerks in the Court of *Chancery*, and made an order, by which he directed their fees to be increased, according to a schedule annexed; and that, in consequence of this order, the sworn and waiting clerks in the *King's Remembrancer's Office*, whose duties in equity causes are similar to those of the sworn and waiting clerks in *Chancery*, prepared a table of increased fees, to be submitted to the Court of *Exchequer*, which table was carried into the *Deputy Remembrancer's Office*, and has been acted upon ever since.—That it was stated to them, the commissioners, that such table of increased fees had been laid before the Court of *Exchequer* by the late First Secondary, but no order was made by the Court on the subject.—That the report further stated, that these increased fees have been the subject of frequent taxation before the Deputy Remembrancer, and had been allowed by him ever since 1807; and in one case in equity, the allowance was objected to, and exceptions taken to the report of costs, which exceptions were over-ruled by the Barons.—That in a table of fees set forth in the said report of the said commissioners, as taken by the sworn and side clerks, is the following:—"For every term a cause is in agitation, a term fee of 6*s.* 8*d.*" Upon which the said commissioners had observed, "The presentment contains a fee for every client, whom they are towards, every term, 3*s.* 4*d.*; a term fee is received in relation to those terms only in which some proceedings take place." That the fees referred to by the commissioners, and stated in the second column, are thus set forth:—"For every term in which a proceeding takes place in an equity cause, 6*s.* 8*d.* For every term in which a proceeding takes place in a revenue cause, 3*s.* 4*d.*"

The affidavits on the part of the clerk in Court stated, that the term fee of the clerks in Court in the *King's Remem-*

*brancer's Office*, which had been immemorially charged at the sum of 3*s.* 4*d.*, and the term fee of the solicitors to the several boards of public revenue, and of all other solicitors practising in the said office, which had been previously charged at the sum of 6*s.* 8*d.*, were, in or about the year 1807, increased and allowed on taxation as follows, *viz.*—the term fee of the clerk in Court from the said sum of 3*s.* 4*d.* to the sum of 6*s.* 8*d.*, and the term fee of the solicitor from the said sum of 6*s.* 8*d.* to the sum of 10*s.*

That such increased amounts have been uniformly allowed on taxation in the stamp prosecutions since the passing of the stamp act in 1813 (*a*). The affidavits then set out some extracts from a document, found in a volume in the *British Museum*, marked “*Cæsar Collections Exchequer* 168,” supposed to have belonged to Sir *Julius Cæsar*.

The document was first described—“The byll of the fees claimed by his Majesty's clerks, being attorneys in the office of his Majesty's Remembrancer in the *Exchequer*, as their due fees taken by them and their predecessors time out of mind.” And above an enumeration of the fees there was the following heading:—“Ancient fees required and taken by his Majesty's sworn clerks, being attorneys in the office of his Majesty's Remembrancer of the *Exchequer*, as their due fees taken by them and their predecessors time out of mind.” Then followed the fees, and the first set down was—“For the attorney's fee of every client for every cause he is towards every term, *iiis. iiid.*”

The affidavits then stated, that Sir *Julius Cæsar* was Chancellor of the *Exchequer*; and that a commission had, in the reign of *James* 1st, been directed to him and others to regulate the fees of the officers of the Court of *Exchequer* and other Courts.

(*a*) Sect. 23 of that act (53 Geo. 3), gives costs to the Crown in stamp prosecutions.

Revenue,  
1832.

ATT.-GEN.  
v.  
MUNDAY.

Revenue,  
1832.

ATT.-GEN.

v.

MUNDAY.

The affidavit then set out from another document in the *British Museum*, appearing to be discourses on the Courts of Justice in *England*, an extract from ordinances made in *Chancery* in 1596, which ordered that “no sixe clerke take less of his *retaynor* than *iijs. iiijd.*, and so termely during the continuance of the cause.”

The affidavits then mentioned old bills of costs from 1770 to 1780 in the Government departments, in which there were charges by the clerks in Court for a term fee upon the issuing a *subpœna*, when it was the only proceeding in the term, and stated that the practice was so, though no proceeding subsequent to the *subpœna* was ever had.

The case was argued by the *Attorney-General* and *Shepherd* for the Crown, and by *Jervis* and *Follett* for the clerk in Court.

Lord LYNDHURST, C. B.—The authority for issuing the *subpœna* is either an information filed, or supposed to be filed. We are of opinion, therefore, that, with respect to the term fee, the officer is entitled to it precisely in the same way as if the information were actually put upon the file at the time when it was supposed to be there. The only remaining question is the amount of the fee; the ancient fee was *3s. 4d.*; that fee has never been altered by any competent authority, and though a change has taken place in some respects since the year 1807, that change and that practice has not been uniform, because it appears by the affidavits that the customs and the excise have paid only *3s. 4d.*, and that payment has been regularly acquiesced in. In addition to which circumstance, when the matter came before the Commissioners in the year 1822, and they took a review of what had taken place in this Court since the year 1807, they recommended that the old fee in cases of this kind should be continued. We are of opinion, therefore, that no more than *3s. 4d.* ought to be taken as the amount of the term fee.

BAYLEY, B.—I entirely agree that in this case the fee is payable, and that it ought to be 3s. 4d., and 3s. 4d. only. As to the fee being payable—when you issue a *subpœna*, you issue it upon the presumption that there is an information previously filed; and if an information had been previously filed, it is conceded that then the term fee would have been payable; and it is at the instance of the party by whom these costs are taxed, and who is to pay these costs, that the *subpœna* issues without the information being actually filed. As to the *quantum*, till the year 1807, it is conceded that 3s. 4d. and 3s. 4d. only was the amount of the fee. Has it then been altered by any competent authority since that period? I am of opinion that it has not.

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GARROW, B., concurred.

VAUGHAN, B.—I am of the same opinion. The process imports that the information has been filed, and according to the old course of the *Exchequer* it ought to be so. It must be taken, therefore, that a proceeding has been instituted, and then the term fee attaches. The question is, therefore, simply upon the *quantum* of that fee. I conceive that the Judges can never exercise a more wholesome duty than in watching with vigilance, and taking care, that wrongful fees do not, by silent acquiescence, in time become inveterate, so as to establish something like the appearance of a title to them. The act of Parliament (a) vests in the Court the jurisdiction to make any alteration they think fit; but have they made any such alteration? It may be very properly submitted to their consideration, whether any order in future shall be made, but being called upon simply to say, whether the title to this fee is established, there is no authority, as it seems to me,

(a) 3 Geo. 4, c. 69.

Revenue,  
1832.

ATT.-GEN.  
v.  
MUNDAY.

upon which the title rests. I, therefore, am of opinion that at present the party can claim only 3s. 4d.

Rule accordingly.

ATTORNEY-GENERAL v. JEYES.

The practice on the revenue side, requiring a defendant to file his affidavit against a rule one day before the rule comes on, is not strictly enforced. *Quære*, if such practice applies to a motion to enlarge a rule.

**MILLER** moved to enlarge a rule calling on the defendant, as executrix, to deliver in her accounts to the Legacy Duty Office.

**Amos.**—The defendant's affidavits have not been on the file one day previously to this motion, according to the practice on the revenue side of the Court.

**BAYLEY, B.**—I think it doubtful whether that rule applies to a motion to enlarge a rule; but at all events that practice is not now strictly adhered to.

Rule enlarged.

LEWIS v. GOMPERTZ.

Exch. of Pleas,

An affidavit to hold to bail on a bill of exchange, which states that the defendant is indebted in a sum specified, is sufficient, without stating the amount of the bill.

An affidavit to hold to bail for a sum due to plaintiff as indorsee of a bill of exchange, must state by whom the bill is indorsed; stating that it was *duly* indorsed to the plaintiff is insufficient.

**R. v. RICHARDS** had obtained a rule *nisi* to discharge the defendant out of custody, on filing common bail for defects in the affidavit to hold to bail. The affidavit stated, that the defendant was indebted to the plaintiff in the sum of 100*l.*, as indorsee of a bill of exchange, drawn, &c., (describing the bill), but did not state the *amount* of the bill of exchange, nor *by whom* it was in-

dorsed, but merely stated that it was *duly* indorsed to this deponent.

*Exch. of Pleas,*  
1832.

LEWIS  
v.  
GOMPERTZ.

*Hutchinson* shewed cause.

*Richards*, in support of the rule as to the defect in the statement of the indorsement, cited *M'Taggart v. Ellice* (a); and mentioned, that *Patteson, J.*, had in a very recent case ordered a bail-bond to be cancelled for a similar defect. As to the other point, he cited *Bosanquet v. Fillis* (b).

LORD LYNDHURST, C. B.—*Duly* indorsed is a mere inference; we should see on the face of the affidavit by whom it is indorsed.

BAYLEY, B.—I have looked at several cases in which the objection as to not stating the amount would have occurred if there were any thing in it (c). On the other point, I think that the affidavit must state by whom the bill is indorsed.

VAUGHAN, B.—It is swearing to the legal effect merely.

Rule absolute.

(a) 4 Bing. 114.

(b) 4 M. & S. 430.

(c) See *Hanby v. Morgan, ante*,  
p. 331.

*Each. of Pleas,*  
1832.

## KIRK v. ALMOND.

An affidavit to hold to bail for money due by maker to payee of a promissory note, must state when the note is payable, or that it is overdue.

When an affidavit to hold to bail on three promissory notes was defective as to two of them, the Court discharged the defendant on filing common bail, and would not order bail to be taken to the amount of the note as to which the affidavit was sufficient.

**HUMFREY** obtained a rule *nisi* to discharge the defendant out of custody on filing common bail, on the ground of defects in the affidavit to hold to bail.

The affidavit stated, that the defendant was justly and truly indebted to the plaintiff in the sum of 130*l.* and upwards, on a certain promissory note, drawn by the defendant on the 3rd *December*, 1826, and payable to the plaintiff or her order on demand for the sum of 80*l.*, and lawful interest; and on a certain other promissory note, drawn by the defendant on the 7th day of *May*, 1829, payable to the plaintiff or her order, for the sum of 30*l.*, and lawful interest; and on a certain other promissory note, drawn by the defendant on the 7th *May*, 1829, for the sum of 20*l.*, and payable to the plaintiff or her order, with lawful interest. The defects were, the omission of stating when the two last notes were payable, or that they were overdue and unpaid.

*Cresswell* shewed cause.—If no time is specified, the notes must be presumed to have been payable on demand. The statement that the defendant is justly and truly indebted is a sufficient allegation that they were overdue and unpaid.

[*Bayley*, B.—He would be justly and truly indebted if they were not payable for six months. It is *debitum in præsentî, solvendum in futuro.*]

Supposing that the affidavit is bad as to the two last notes, it is good for the first note for 80*l.*, and, therefore, at all events the defendant ought to give bail for that sum, and the interest due upon the first note. Besides, it does not appear from the defendant's affidavits that he was arrested for the whole sum, and he may only have been ar-

rested for the sum due on the first note, as to which the affidavit is sufficient.

*Exch. of Pleas,*  
1832.

KIRK  
v.  
ALMOND.

*Humfrey*, in support of the rule, relied upon *Jackson v. Yate (a)*.

*Per Curiam*.—The whole debt is stated in this affidavit to be due on the several notes mentioned therein, and the defendant is in substance alleged to be indebted by virtue of those three several instruments. The presumption is, that the defendant was arrested for the sum sworn to, and that he is now in custody for that amount. For part of that amount the affidavit shews no right to arrest; and as we know of no instance in which an affidavit of debt bad in part, and good in part, has been upheld as to the good part, the defendant must be discharged on filing common bail.

Rule absolute.

(a) 2 M. & S. 148.

### GLASCOTT v. CASTLE.

THE Sheriff having paid the costs, after an attachment for not bringing in the body—

*Knowles* obtained a rule to shew cause why the costs should not be referred to the Master to be taxed.

Against which *Hoggins* now shewed cause. After payment of an attorney's bill of costs, it is only under special circumstances, such as fraud or gross imposition, that the party is entitled to refer the bill to be taxed.

The Court will refer an attorney's bill of costs to be taxed by the Master, after it has been paid, on application *within a reasonable time*, without shewing circumstances of fraud or imposition.

*Exch. of Pleas,*  
1832.

GLASCOTT  
v.  
CASTLE.

BAYLEY, B.—That depends on the time when the application is made. If it is made within a reasonable time, Judges at chambers are in the practice of directing a bill to be taxed as a matter of course. If there has been any delay, then the party applying must shew fraud or imposition. I am therefore of opinion, in this case, that as the Sheriff has paid the costs, the party is fairly entitled to have the bill of costs taxed by the Master.

Rule absolute.

WILLETT v. WILSON.

Process was returnable and served on the 4th of November, and a declaration delivered *de bene esse* on the 10th, indorsed "to appear and plead in eight days." The plaintiff, on the 14th, entered an appearance for the defendant, and, on the 18th, the defendant appeared, and the plaintiff on the 19th signed judgment without demanding a plea:—*Held*, that the indorsement on the declaration enlarged the time for the defendant to appear in, and that the judgment signed without demanding a plea was irregular.

THE process in this case was returnable and served on the 4th of November. On the 10th, pursuant to rule 10, T. T. 1 Will. 4, a declaration *de bene esse* was delivered, indorsed "the defendant is to *appear* and plead hereto in eight days." On the 14th, the plaintiff entered an appearance according to the statute. On the 18th, the defendant entered an appearance. On the 19th, the plaintiff, having received no notice of the defendant having entered an appearance, signed judgment without demanding a plea, and without searching whether an appearance had been entered for the defendant after the 14th.

*Hall*, having obtained a rule to set aside the proceedings for irregularity, on the ground that the plaintiff had signed judgment without demanding a plea—

*Platt* shewed cause.—According to the old practice, the declaration might have been delivered immediately on the return of the writ, but the rule 1 Will. 4, requires that six days shall elapse from that time before the declaration can be delivered. The time for appearing, according

to the old practice, would have expired on the 12th, and for pleading on the 18th. The consequence of holding this proceeding to be irregular, would be to give the defendant additional time, which was not intended. The notice to appear and plead within eight days compels him to do both, and dispenses with the necessity of a demand of plea. The defendant had already appeared, as an appearance was regularly entered for him according to the statute, and no demand of plea was necessary.

*Exch. of Pleas,*  
1832.

WILLETT  
v.  
WILSON.

LORD LYNTHURST, C. B.—The difficulty is, you call upon him to *appear* in eight days.

BAYLEY, B.—If the declaration had been delivered conditionally, with notice “to plead thereto in eight days,” then an appearance having been regularly entered for the defendant according to the statute, no demand of plea was necessary, and your judgment might have been regular. If your notice had only required him to plead within eight days, then his appearance after you had appeared for him, would have been a nullity. The difficulty is, that you require him to *appear* within eight days, by which you give him time until the 18th to appear. The Court are of opinion that an appearance having been entered by him within that period, he was entitled to a demand of plea. The rule must, therefore, be made

Absolute, with costs.

*Each. of Pleas,*  
1832.

AMPTHILL v. SEMPLE.

Where a plea was delivered after the time for pleading had expired, but before judgment was actually signed, of which the plaintiff's attorney was apprized, but afterwards signed judgment, because the time for pleading was out, the Court set aside the judgment for irregularity, and ordered the costs to be paid by the plaintiff's attorney.

ON the day after the time for pleading had expired, the defendant's attorney went to the office of the plaintiff's attorney, and delivered a plea to a clerk in the office. The defendant's attorney went from thence to the judgment office, where he met the plaintiff's attorney, and having ascertained that judgment was not signed, told the plaintiff's attorney that a plea had been delivered, and that he could not sign judgment. The plaintiff's attorney however signed judgment, alleging, that, as the time for pleading had expired, he was entitled to do so.

*Steer*, having obtained a rule to set aside the judgment for irregularity, with costs to be paid by the plaintiff's attorney—

*Alexander* now shewed cause, and submitted, that, at all events, the plaintiff's attorney ought not to be called upon to pay the costs.

*Per Curiam*.—The plaintiff's attorney signed judgment with full knowledge of the circumstances. If the plea be pleaded before judgment is actually signed, it is regular; and, therefore, to sign judgment afterwards, is an irregularity. There was no pretence for signing judgment here, and, therefore, the rule must be made

Absolute, with costs to be paid by the plaintiff's attorney.

*Exch. of Pleas,*  
1832.**HEWS v. PYKE.**

**I**N this case the defendant had deposited in the hands of the Sheriff the amount for which the arrest was made, and 10*l.* for costs, in lieu of bail to the Sheriff; and that sum, together with a further sum of 10*l.*, as an additional security for the costs of the action, was afterwards paid into Court, pursuant to 7 & 8 *Geo.* 4, c. 71. The plaintiff recovered a verdict, taxed his costs, and issued execution for the whole amount of the damages and costs, without regard to the money paid into Court. The case having been afterwards referred to the Master to review his taxation, and a considerable deduction having been made, the defendant applied to the Court for the costs of the motion to review, and to set aside the levy under the execution to the amount of the money paid into Court. The whole of the matter in dispute was referred to the Master, who reported, on the principle, that the plaintiff had no right to issue execution for the whole amount of damages and costs, but was bound to take the sum deposited out of Court, and levy for the remainder only.

Where money was deposited in Court in lieu of putting in and perfecting bail above, pursuant to statute 7 & 8 *Geo.* 4, c. 71, and the plaintiff obtained a verdict:—  
*Held*, that he was not at liberty to issue execution for the whole sum recovered, but was bound to take the sum deposited out of Court, and to limit his execution to the surplus only.

*Crowther*, now applied that the Master might be directed to review his report; and submitted that the statute was not compulsory on the plaintiff to take the money deposited out of Court, but only gave him a right to do so if he thought proper, leaving him still at liberty to issue execution for the whole amount of damages and costs.

*Follett* shewed cause in the first instance.—The Master's report is correct, and he has construed the statute properly. The view taken by the Master was, that, as the money was deposited in Court in lieu of bail, there to remain "to abide the event of the suit," the successful party only was entitled to take the money out. It would, there-

*Exch. of Pleas,*  
1832.

HEWS

v.  
PYKE.

fore, be an extreme hardship on the defendant, and quite inconsistent with the object of the statute, which was intended for the relief of defendants, that the plaintiff should be at liberty to levy for more than the excess.

*Per Curiam.*—The statutes 43 Geo. 3, c. 14, and 7 & 8 Geo. 4, c. 71, which were intended for the benefit of defendants subject to arrest, would effect a great hardship, if a plaintiff might pass by the money paid into Court, and issue execution for the whole sum recovered, and the costs. Suppose the case of a person arrested for 1000*l.*; he would be put to the inconvenience of raising that amount to pay into Court, and, after verdict, of finding a like sum to meet the execution, or of suffering his goods to be sold by the Sheriff, and afterwards of waiting until an order could be obtained to have the money paid to him out of Court. To the plaintiff no hardship can accrue, as he can obtain the money out of Court at any time, and will be entitled to the costs of taking it out. The just interpretation of the direction in the Act, that the sum deposited shall remain in Court “to abide the event of the suit,” is, that the plaintiff, if he succeeds, shall not be *entitled* only, but *bound* to resort to that in the first instance, and can issue his execution for the surplus only.

Rule refused.

END OF HILARY TERM.

# REPORTS OF CASES

ARGUED AND DETERMINED

IN

## The Courts of Exchequer

AND

## Exchequer Chamber.

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EXCHEQUER OF PLEAS, EASTER TERM, 2 WILL. IV.

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1832

COX *v.* THOMASON and WIFE.

**T**HE first nine counts of the declaration were for a malicious prosecution. The tenth began by stating, by way of inducement, that before the committing of the grievances, &c., a certain portmanteau of the defendant *Thomason*, containing a sum of money, together with the money, had been feloniously stolen, taken, and carried away. The count then alleged a verbal slander relating to the portmanteau.

The eleventh count was as follows:—And afterwards to wit, on the 5th day of *November*, 1831, in the county aforesaid, in a certain other discourse, which the said defendant, *Elizabeth Thomason*, then and there had with, and in the presence of one *Joseph Guildford* and divers

In an action of slander, the declaration stated the *colloquium* to be of and concerning certain meat of one *A. B.*, which he had before purchased of the plaintiff, who had before then purchased the same of certain other persons, and had paid for the same. The declaration then stated, that the slanderous words complained of, imputing that the

plaintiff had stolen the money with which he paid for the meat, were spoken of and concerning the said meat. The part of the inducement, which stated, that the plaintiff had purchased the meat and paid for it, was not proved:—*Held*, that the want of such proof was immaterial.

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1832.

Cox  
v.  
THOMASON.

other good and worthy subjects of our said Lord the King, who then and there knew, and had heard of the premises in the introductory part of the said tenth count mentioned, of and concerning the said plaintiff, and of and concerning the said money in the introductory part of the said tenth count mentioned, and of and concerning the said *Joseph Guildford*, and of and concerning certain meat of the said *Joseph Guildford*, which he had before then purchased of the said plaintiff, *who had before then purchased the same of certain other persons, and had paid for the same*, she, the said *Elizabeth Thomason*, further contriving and intending as aforesaid, then and there, in the presence and hearing of the said *Joseph Guildford* and of the said other subjects of this realm, spoke and published to the said *Joseph Guildford*, of and concerning him, the said *Joseph Guildford*, and of and concerning the said meat, the words following (that is to say), Where did you (meaning the said *Joseph Guildford*) buy that meat (meaning the said meat of the said *Joseph Guildford*)? To which the said *Joseph Guildford* then and there answered and replied, and spoke and published, in the presence and hearing of the said subjects, of and concerning the said plaintiff, and of and concerning and relating to the said meat, and of and concerning the said *Joseph Guildford*, the words following (that is to say), "*of Butcher Cox*," meaning the said plaintiff, and meaning that he, the said *Joseph Guildford*, bought the said meat of the said plaintiff; whereupon the said defendant, *Elizabeth*, further contriving and maliciously intending to injure the said plaintiff, as aforesaid, then and there, in the presence and hearing of the said *Joseph Guildford* and of the said other subjects, falsely, wickedly, and maliciously spoke and published the following false, scandalous, malicious and defamatory words, of and concerning and relating to the said meat, and of and concerning and relating to the said plaintiff, and of and concerning and relating to the said money, in the introductory part of the

said tenth count mentioned (that is to say)—*It's devilish hard that people should stuff their guts with meat that my money* (meaning the money in the introductory part of the said tenth count mentioned) *has paid for* (meaning that the said plaintiff had feloniously stolen the said money, and had paid for the said meat with the same).

*Exch. of Pleas,*  
1832.

Cox  
v.  
THOMASON.

There were several other counts respectively similar to the tenth and eleventh.

At the trial before *Gaselee, J.*, at the last Assizes for the county of *Somerset*, the defendant had a verdict on the counts for a malicious prosecution, and on all those for slander, except the eleventh and some similar counts for the same slander, on which the same question arose as on the eleventh. On the eleventh, and the similar counts, the plaintiff proved the words and the inducement, except that part of the inducement which stated that *Cox*, the plaintiff, had before then purchased the same meat of certain other persons, and had paid for the same. The plaintiff had a verdict on those counts, with 40s. damages.

*Crowder* now moved for a new trial.—The inducement was not proved. It is stated, that the meat, of and concerning which the slanderous words are stated to have been spoken, had been purchased by *Cox* from other persons, and had been paid for by him. The words are expressly laid to have been spoken of and concerning the “said meat.” It might not have been necessary to state such inducement; but as the plaintiff has stated it, it was necessary for him to prove it. In *Sheppard v. Bliss* (a), it was alleged, that the words were spoken of and concerning certain soap, asserted by *A. B.* to have been *stolen* out of his yard. The evidence was, that *A. B.* had asserted, that the soap had been *taken* out of his yard; and Lord Chief Justice *Abbott* held the variance fatal.

(a) 2 Starkie, N. P. C. 510.

*Exch. of Pleas,*  
1832.

Cox  
v.  
THOMASON.

BAYLEY, B.—It might be in that case, that without those words of *A. B.* the words of the defendant might not have imputed a theft. If the words are actionable without the inducement, I do not know that the insertion of what is not proved occasions a variance; you are only bound to prove what is material.

The rest of the Court concurred, and the rule was

Refused.

#### BIGGINS v. GOODE.

In case for selling goods distrained for rent without an appraisement, the measure of damages is the value of the goods minus the rent (a).

CASE for an excessive distress, selling without appraisement, and other irregularities in conducting the distress and sale.

At the trial, before *Garrow, B.*, at the *London* Sittings after last *Hilary* Term, the plaintiff had a verdict on the count for selling without an appraisement, for 50*l.*, the value of the goods sold minus the rent due, with leave to move to increase the damages to 90*l.*, the whole value of the goods sold.

*Bompas, Serjt.*, now moved accordingly.—The plaintiff was entitled in this action to recover the whole value of these goods. They were sold without any proper appraisement. The sale of goods distrained for rent was authorized by the statute 2 *W. & M.* sess. 1, c. 5. Before that statute, the sale of goods taken for a distress was wholly illegal, and made the distress illegal and void, and the taker a trespasser *ab initio*, and clearly liable to the

(a) The same point was decided coram *Parke, J.*, Nottingham Lent Assizes, 1832.  
at *Nini Prius*, in *Notts v. Curtis*,

whole value of the goods taken. The second section of that statute, after directing how the goods shall be disposed of and appraised, enacts, that the landlord, *after such appraisal*, shall and may lawfully sell. Appraisal is, therefore, a condition precedent to the sale, by the express words of that statute.

*Exch. of Pleas,*  
1832.

BIGGINS  
v.  
GOODL.

[*Bayley, B.*—The question does not turn upon that statute, but on the 11 *Geo. 2*, c. 19, s. 19, which recites, that “it hath sometimes happened, that, upon a distress made for rent justly due, the directions of the statute of *W. & M.* have not been strictly pursued; but, through mistake or inadvertency of the landlord, some irregularity or tortious act hath been afterwards done in the disposition of the distress, for which irregularity or tortious act the party distraining hath been deemed a trespasser *ab initio*, and in an action brought against him as such, the plaintiff hath been entitled to recover the full value of the rent for which such distress was taken.” And it then proceeds to enact, “that, where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, &c., the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers *ab initio*; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass, or on the case, at the election of the plaintiff or plaintiffs.”]

In *Winterbourn v. Morgan* (a), the Court of *King's Bench* held, on the construction of the 11 *Geo. 2*, that, where the party distraining continued in possession of the goods upon the premises for fifteen days, and during the four last was removing the goods, he was liable in trespass; and

(a) 11 East, 395.

*Exch. of Pleas,*  
1832.

Biggins  
v.  
Goode.

*Le Blanc, J.*, said (a) in that case—"All that the act, as I conceive, meant to say, was, that a party whose entry was lawful to take a distress on the premises, should not be deemed a trespasser *ab initio*, for any subsequent irregularity, as he was deemed to be before that act." The 11 *Geo. 2*, therefore, did not affect the remedy for any subsequent illegal act, but merely for the original seizure, which would, without that provision, have become a trespass by the subsequent irregularity. It is not contended by the plaintiff, that the original seizure became wrongful, but the action is for selling, and selling without a proper appraisement is wrongful and illegal. The statute only gives the power of sale after appraisement. The case, therefore, is that of a sale of another man's goods, without authority, and is not protected by the statute, which only prevents the original seizure and distress from being void and illegal, by reason of any irregularity. The sale here was wholly void, as in the case of the growing crops, in *Owen v. Leigh* (b), where the Court of *King's Bench* held the sale altogether void.

[*Bayley, B.*—What special damage do you suffer by the sale being made without an appraisement? The landlord had a right to sell, but not in the manner in which the sale was conducted. Your interest in those goods, when they were in the landlord's hands, before the sale, was subject to the landlord's right for the rent due. Your interest could only be in the surplus value of the goods, after satisfying the rent.]

The right to replevy was lost by the sale. If the appraisement had taken place, the tenant might have tendered the rent if he were not satisfied with the amount at which the goods were appraised. The appraisement being a condition precedent to the sale, the plaintiff has a right to recover for what the defendant had no right to sell.

(a) 11 East, 403.

(b) 3 B. & A. 470.

LORD LYNDHURST, C. B.—The act expressly says, that the distress shall not be deemed unlawful. If the distress be valid, the landlord can recover his rent under that distress, and your interest in the goods distrained is the value *minus* the rent. If the tenant has sustained any injury, then by the words of the act he is entitled to receive satisfaction for the special damage he shall have sustained by the unlawful act and irregularity, and no more.

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1832.

BIGGINS  
v.  
GOODE.

BAYLEY, B.—This is a plain case. If the statute of *W. & M.* only be looked to without reference to the provisions of the 11 *Geo. 2*, no doubt the sale would be unlawful under the statute of *W. & M.* But let us see whether the statute of *Geo. 2*, does not deal with cases where the original distress was lawful, but where there has been some irregularity or unlawful act done subsequently. (The learned Baron here referred to the words of the 11 *Geo. 2*, c. 19, s. 19). Now, what is the special damage which the party has sustained under these circumstances? The act says, that the distress is not to be deemed unlawful. The landlord has distrained for 40*l.* goods worth 90*l.*, and has sold them without an appraisement. What is the damage then which the party has sustained under these circumstances? The goods unsold were subject to the lien of the landlord. The owner, therefore, had an interest to the surplus value only, that is, to the value *minus* the rent.

VAUGHAN, B.—I am of the same opinion, and I think that the present is one of the very cases which the act of Parliament intended to remedy. The distress is not to be deemed void. Therefore, under a valid distress the party distraining has been guilty of an irregularity in the sale; the owner then is to recover his damage, that is, the full value of the goods subject to the rent.

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v.  
GOODE.

BOLLAND, B.—I am of the same opinion. In *Wallace v. King* (a), a question arose as to the proper constable to swear the appraiser under the 11 *Geo. 2*. The Court did not decide that question, but they held that trover could not be supported, not being a remedy which could be pursued since the 11 *Geo. 2*, as it tended to place the landlord in the same situation as before the passing of the act, by considering him as a trespasser *ab initio*.

Rule refused (b).

(a) 1 H. Bl. 13.

(b) See *Lyon v. Weldon*, 2 Bing. 334.

#### SINGLETON, Executor, v. BARRETT.

Where the particulars of the plaintiff's demand were on an account stated, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum was inadmissible for want of a promissory note stamp:—*Held*, that the account stated might be proved by other evidence than the memorandum. *Held*, also, that verbal evidence was admissible of an admission of the money being due, and a promise to pay it by instalments, though such admission and promise were made at the time of signing the memorandum, and were embodied in it.

**D**EBT by the executors of *William Singleton*, for use and occupation, and on an account stated with the testator. The particulars of the plaintiff's demand were on an account stated between the deceased and the defendant, "as appears by a memorandum in the hand of the defendant of this date."

At the trial, before *Parke, J.*, at the last Lent Assizes for the county of *Nottingham*, the plaintiff produced a book with the memorandum alluded to, which was objected to by the counsel for the defendants, as amounting to a promissory note, and not being stamped. The learned Judge allowed the objection, but examined the son of the deceased, the witness who had produced the book, and he stated, that he was present when the memorandum was written in the book, and heard the defendant promise to pay his father 11*l.*, in instalments at particular times,

which he mentioned; that he heard his father say to the defendant, that he owed him 11*l.*, and he knew of the defendant having occupied the premises in question. It was objected, on the part of the defendant, that the particulars excluded the evidence of the son, and that parol evidence was not admissible, as the provision to pay by instalments had been reduced into writing.

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1832.

SINGLETON  
v.  
BARRETT.

The learned Judge overruled both objections, and the plaintiff had a verdict.

*White* now moved for a new trial.—The evidence did not agree with the particular, which was a sum due on an account stated, “as appears from a memorandum.”

[*Bayley*, B.—The substance of the particular is, that the demand is on an account stated.]

[Lord *Lyndhurst*, C. B.—Suppose a particular say, “as will appear by the evidence of *John Thomas*,” would that exclude proof by any other witness?]

Then the conversation and the promise to pay by instalments being reduced into writing, parol evidence of such conversation and promise was inadmissible.

LORD LYNDHURST, C. B.—If a person give a receipt, you may prove the payment by parol (a). I have no doubt, that what a party says, admitting a debt, is evidence, notwithstanding the promise to pay is reduced into writing.

The rest of the Court concurred, and the rule was

Refused.

(a) *Jacob v. Lindsay*, 1 East, 460.

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1832.

WATSON, One &c. v. POSTAN and Another.

In an action on an attorney's bill, against two:—*Held*, that a Baron at Chambers might, in his discretion, on the application of a defendant, order the bill to be taxed, without such defendant giving the undertaking to pay the amount.

**I**N an action on an attorney's bill, *Bolland*, B., on the application of *Postan* one of the defendants only, made an order, at Chambers, for taxing the bill, without requiring an undertaking from *Postan* or his attorney to pay the costs which should be taxed.

*Busby* moved for a rule to shew cause why the order should not be rescinded, or *Postan* enter into the undertaking.

He urged, that one of two joint defendants, taking out a summons to tax an attorney's bill, was equally liable to give the undertaking as if the action had been brought against him alone.

Before the statute 2 *Geo. 2*, c. 23, an attorney's bill could not be taxed, unless an action were depending thereon, nor without bringing the amount of it into Court (a).

That statute conferred a benefit on defendants, by relieving them from the necessity of bringing the money into Court, but an equivalent is given to the plaintiff, by requiring an undertaking to pay the amount of the taxation.

In the present case, *Postan* will have had all the benefit of the taxation, and will have delayed the plaintiff more than the month, without the plaintiff having any equivalent.

**LORD LYNTHURST, C. B.**—This order was not made in pursuance of the act of Parliament, but under the juris-

(a) *Tidd's Prac.* 326, 8th edit.

diction which the Court has at common law (*a*), and the Court may mould its orders as it thinks proper. I see no objection to the Court, in its discretion, ordering a taxation in a case where an action is depending, without an undertaking from the defendant to pay what should be found due.

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v.  
POSTAN.

BAYLEY, B.—It is entirely in the discretion of the Judge to say upon what terms the matter should go before the Master. In an action against two, one defendant may very reasonably say, I dispute my liability altogether; but still I wish to have the amount properly ascertained.

Rule refused.

(*a*) See *Jones v. Byewater*, *post*, and *Dagley v. Kentish*, 2 B. & Add. 411, as to the jurisdiction of the Courts at common law in such case. The power by the statute is expressly “on submission of the parties, &c., to pay, &c.”

### JONES v. BYEWATER.

**THIS** was an action on an attorney's bill.

*Thesiger* had obtained a rule to refer the bill for taxation. The bill was wholly for business done in suing out and prosecuting a commission of lunacy against a person who was found by the inquisition of the jury not to be a lunatic.

*Wakefield* shewed cause.

The rule was obtained on two grounds:

*First*, on the authority of *Wilson v. Guthridge* (*a*),

(*a*) 3 B. & C. 158.

In an action on an attorney's bill for business done in suing out and prosecuting a commission of lunacy, the Court discharged a rule to refer the bill to the Master for taxation, observing that, if taxable, it would be better taxed in *Chancery*:—*Quære*, whether a bill for business done in lunacy is taxable.

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BYEWATER.

where it was said that the Court had a permanent jurisdiction independently of the statute 2 *Geo. 2*, c. 33, to refer an attorney's bill for taxation. That case, however, has been over-ruled by the recent decision of *Dagley v. Kentish* (a).

In that case, after consultation with the other Judges, the Court of *King's Bench* refused to act on the general superintending power which the Court has over its officers independently of the statute, there being no taxable item in the bill.

That case also shews, that the fact of the attorney having brought an action does not alter the case.

But, *secondly*, it is said that the bill is taxable, as being for business done in lunacy.

It is not business done either at law or in equity. It is not a matter of course that the jurisdiction over lunatics should be given to the Chancellor. It is given by separate writ, and does not necessarily follow the Great Seal.

In *Ex parte Daun* (b), it was held, that a bill for business done as solicitor in the affairs of a charitable foundation, the office of visitor being held by the Lord Chancellor, was not taxable.

The present proceeding is by commission, not by writ. The proceeding by writ has long been disused in the case of lunacy. The business in this case was not done in any Court.

[*Bayley, B.*—Is it not a judicial proceeding? Cannot a person swearing falsely in such an investigation be indicted for perjury.]

It is not a judicial proceeding. It need not even be before legal persons.

[*Bayley, B.*—Does not the commission make the persons to whom it is directed Judges *pro hac vice*.]

(a) 2 B. & Ad. 413.

(b) 9 Ves. 547.

Business done in suing out patents is not taxable, nor a bill for obtaining an act of Parliament.

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BYEWATER.

*Thesiger*, in support of the rule.—It must be conceded after the case of *Dagley v. Kentish*, that this rule cannot be supported on the authority of *Wilson v. Guthridge*.

The items, however, are taxable. This is a proceeding at law. The commission issues out of the Petty Bag Office, which is on the law side of the Court of *Chancery*, and errors in such proceedings must be rectified by writ of error. “The previous proceedings on the commission to inquire whether or no the party be an idiot or a lunatic are on the law side of the Court of *Chancery*, and can only be redressed, if erroneous, by writ of error, in the regular course of law (a).” The distinction is between the commission for care and custody, and the one to proceed by inquisition to the finding the party lunatic or not (b). Proceedings in bankruptcy are taxable. *Collins v. Nicholson* (c), *Burton v. Chatterton* (d).

[Lord *Lyndhurst*, C. B.—The party has a right to traverse. Are not the proceedings on such traverse proceedings at law?]

A proceeding by *scire facias* to repeal a patent is clearly a proceeding at law, and issues, like the present proceeding, out of the Petty Bag Office.

LORD LYNTHURST, C. B.—There is a petition in the first instance to the Chancellor,—that petition is heard upon affidavits. If the petition is granted, the commission issues from the office of the Clerk of Custodies. When the inquisition is taken, it is returned into the Petty Bag Office. If any proceedings take place upon that return, it is by petition to the Chancellor. The party then traverses,

(a) 3 Bl. Com. 427.

(b) 3 P. Williams, 138.

(c) 2 Taunt. 321.

(d) 3 B. & A. 486; but see *Crowder v. Davies*, 3 Y. & J. 433.

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which he has a right to do on an application. That traverse is heard in the Court of *King's Bench*, and then the proceedings are returned again into the Court of *Chancery*. It is not necessary for us to decide whether this is a bill taxable or not. If it be taxable, the Chancellor has jurisdiction over it; and if it is a bill which ought to be taxed, it will be better taxed by the officers of the Chancellor, who are used to proceedings in lunacy; and we think, therefore, it is proper that the application should be made to the Chancellor; but we give no opinion whether the application ought to be granted.

The rest of the Court concurring, the rule was—

Discharged.

#### HADLEY v. GREEN.

A landlord sued his tenant for rent and on the money counts, and gave particulars on the count for money had and received for a quantity of stone quarried and carried away by the defendant. At the trial he took a general verdict, but for the amount of the rent only. The plaintiff brought another action against the defendant in case, for quarrying and carrying away the stone, and, a few days before the trial of the first action, delivered a particular in the second action for the same stone, exactly corresponding with the particular delivered on the count for money had and received in the first action:—*Held*, that the recovering in the first action was no bar to the plaintiff's recovering in the second.

**ACTION** on the case by landlord against tenant, for quarrying and carrying away stone. There was another count for mismanagement of the farm demised, which was abandoned at the trial.

The plaintiff had brought an action in *Middlesex*, for rent of the same premises, and in his declaration had included the money counts, and had given particulars on his count for money had and received by the defendant, for a quantity of stone, exactly corresponding with the stone mentioned in the particulars in the present case.

In the action in *Middlesex*, the plaintiff took a general verdict, but only to the amount of the rent due. The declaration in the second action was delivered a day or two before the trial of the first.

The particulars in the second action corresponded verbatim with those delivered on the count for money had and received in the first.

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GREEN.

At the trial of the present case, before *Gaselee*, J., at the last *Lent* Assizes for the county of *Somerset*, the plaintiff proved the quarrying and carrying away of the stone mentioned in the particulars; and it was objected, that, having had the opportunity of recovering the value of the stone in the former action, and having taken a verdict for the rent only, he was precluded from recovering the amount of the stone in this action. The learned Judge overruled the objection, and the plaintiff had a verdict for the value of the stone.

*Coleridge*, Serjt., now moved for a new trial.—The verdict in the first action being general, the plaintiff is not at liberty to say that something was not recovered on each count. On the face of the record in the former action, there is a count applicable to the demand in the present.

[Lord *Lyndhurst*, C. B.—You could not receive the full compensation on the count for money had and received.]

The plaintiff had waived the last, by bringing the first action for the value of the stones; and having brought an action which would have included the present demand, he cannot be permitted to split that demand and bring another action for a part. Lord *Bagot* v. *Williams* (a), *Dunn* v. *Murray* (b), *Bowden* v. *Horne* (c).

LORD LYNDHURST, C. B.—We think that we ought not to grant a rule in this case. The two records are quite different. In the cases relied upon by the defendant, the parties had an opportunity of recovering the whole demand in the first action. They chose to waive that

(a) 3 Barn. & Cress. 238. (b) 9 B. & C. 780. (c) 7 Bing. 716.

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demand, and could not afterwards be allowed to recover it in another action. In the present case, the plaintiff could not have recovered compensation on the first record. He could not have had damages for the carrying away the stone on a count for money had and received. The second record is for something additional, and is essentially different from the first.

BAYLEY, B.—It was decided in *Seddon v. Tutup* (a), that where no evidence was given at the first trial on the count for goods sold and delivered, but the plaintiff took his verdict on a promissory note only, the judgment in the first action was no bar to the subsequent recovering in an action for goods sold. The bill of particulars only informs the defendant what the plaintiff may go into, it does not bind the plaintiff to go into all the matters contained in it. Has not the plaintiff a right to alter his intention before he tries the cause, if he find that he cannot recover full compensation? Here he finds that he cannot recover all he seeks for in debt or *indebitatus assumpsit*. I am of opinion that the plaintiff had a *locus penitentiae*, and a right to make his election as to what he would proceed for until the time of the trial, and that his right of election was not determined until the time of the trial.

In *Lord Bagot v. Williams*, the agent of the plaintiff knew, at the time of the action, that the larger sum was due, and he was contented to take 3400*l.*, which seemed to me to be a plain admission that that sum was all he required. It was equivalent to the consenting to take a verdict for that sum.

In *Dunn v. Murray*, the plaintiff had at the time of the action a complete claim for wages and damages, and he could never make his claim for compensation in any other

(a) 6 Term Rep. 606.

shape. He could not vary his mode of declaring; now, here the plaintiff might have brought his action on the case in the first instance, and he might recover more in that action than he could have done in the action for money had and received.

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&  
GREEN.

Rule refused.

NEAL v. SWIND.

**ASSUMPSIT.** The first count stated an agreement for a lease from the plaintiff to the defendant, an agreement to refer differences which had arisen thereupon, and an award under such reference, and then alleged a breach in non-performance of the award. There were two other special counts; and counts for use and occupation, and money had and received.

Where defendant, in expectation of a lease by indenture, which he had agreed to take from the plaintiff, procured attornments from some of the tenants, and received rents from others:—  
*Held*, liable for use and occupation.

At the trial before *Bolland, B.*, at the *London* sittings after last *Hilary* Term, several objections were taken to the first and other special counts; and the learned Judge having expressed an opinion in favour of the objections, the special counts were abandoned, and the plaintiffs proceeded on the counts for use and occupation, and money had and received. It appeared that, after the execution of an agreement for a lease by indenture, the defendant had procured the attornments of some of the tenants to himself, and had collected some of the rents. The plaintiff having recovered a verdict for one year's rent (the amount being admitted)—

*Jones, Serjt.*, now moved to enter a nonsuit. The agreement was merely executory, and no present interest would pass under it to the defendant, which could render him liable to an action for the rent. The occupation and the receipt of money was in the expectation of the agreement

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being carried into effect; and the remedy, if any, was under that agreement.

LORD LYNTHURST, C. B.—What ground is there for saying that this was not use and occupation? The defendant was in the occupation of the premises by his tenants, when the tenants had attorned to him; and that is exactly the same in point of law as if he had occupied them himself.

BAYLEY, B.—The receiving the rents and profits from the under-tenants was proof of use and occupation by the defendant. If it were not use and occupation, it would be money had and received. What pretence would there be for putting this money into the defendant's pocket, except as holding under the plaintiff? What right could the defendant have to take the attornments from the tenants, and receive the rents, whilst an executory agreement was pending, without the authority of the plaintiff?

It is, however, use and occupation, because the occupation of persons whom you have agreed to receive as your tenants, is your occupation; the holding cannot be split, as it was one entire occupation, not on a demise, but in expectation of a lease, and before it was actually executed. The defendant originally agrees to take a lease by indenture, but, before that is carried into effect, the defendant gets attornments from some of the tenants to himself, and receives rent from others. Upon what pretence can he do this, except under and by the permission of the plaintiff? Why, then, the occupation by the tenants is an occupation by himself, as much as if he were in the actual possession himself; and it being one entire holding, under the expectation of a demise of the whole, it appears to me that the verdict for the whole amount is right on the count for use and occupation.

The rest of the Court concurred, and the rule was—

Refused.

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1832.

## NOEL v. WILLIAMS.

**WHITCOMB** moved for a rule *nisi* to discharge the defendant out of custody, on filing common bail, on the ground of a variance between the *quo minus* and the affidavit to hold to bail—the *quo minus* being at the suit of *Louis Joseph John Noel*, and the affidavit being that the defendant was indebted to the *said John Noel*. It appeared, however, that the description of the deponent making the affidavit, in the commencement of the affidavit, was *A. B.*, clerk to *Louis Joseph John Noel*; and the Court observed, that the word *said* referred to the person named before; and the rule was—

Refused.

Affidavit to hold to bail—"A. B., clerk to L. J. J. N., maketh oath that the defendant was indebted to the said J. N.:" the *quo minus* was at the suit of L. J. J. N.:—  
*Held*, no variance.

## WINPENNY v. BATES.

**HOGGINS** moved to make an agreement of reference a rule of this Court. By the agreement, four actions, depending between the parties to the reference, three of which were in this Court, and the other in the *King's Bench*, were referred to arbitration, and it was provided that the agreement should be made a rule of the Court of *King's Bench or Exchequer*. The arbitrator made an award in favour of the plaintiff, and gave costs in each action to the plaintiff therein. It appeared, from the affidavit of one *James Bates*, that two of the three actions in the *Exchequer* had been brought for his benefit; and he suggested difficulties, which he swore he believed would arise as to the separating and obtaining what was recover-

Where four actions, three in the *Exchequer*, and one in the *King's Bench*, were referred by an agreement of reference, which had been made a rule of the *King's Bench*, under a clause therein, empowering the parties to make it a rule of the *King's Bench or Exchequer*, the Court refused to allow the agreement to be made a rule of

this Court. *Semble*, that the statute 9 & 10 Will. 3, c. 15, only authorizes the making an agreement to refer a rule of one Court, and not of more than one.

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1832.

WINPENNY  
v.  
BATES.

ed on his account, if execution were to issue for the whole debt and costs, under the reference in the *King's Bench*. The original agreement being filed in the *King's Bench*, the application was to make the agreement a rule of this Court, on filing a copy.

LORD LYNDHURST, C. B.—The agreement is in the alternative. It is “of the *King's Bench or Exchequer*.” That might be a sufficient ground for our not interfering; but I see no necessity for such a rule, as the Court of *King's Bench*, of which Court the agreement has already been made a rule, has the full power of doing justice, and dealing with the matter as effectually as this Court could do.

BAYLEY, B.—I do not think that the statute 9 & 10 *Will. 3*, c. 15, authorizes our interference. The words are, “of any of his Majesty's Courts of record.” I doubt whether we should not be going beyond the power given by the act, if we were to allow an agreement, which has been made a rule of one Court, to be made a rule of another. The act says of *any*, and it does not say of more than one. There is only one submission here, and that has been acted on, by making the agreement a rule of one of the Courts.

On the terms of the agreement, however, which is in the alternative, I think that we ought not to interfere. The Court of *King's Bench* has full authority to do justice amongst the parties.

The rest of the Court concurring, the rule was—

Refused.

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1832.

DOE dem. WALKER v. ROE.

**GODSON** moved for judgment against the casual ejector, on an affidavit, that the declaration and notice had been accepted by an attorney of the *Common Pleas*, who did not appear by the affidavit to be an attorney of this Court.

Acceptance of a declaration in ejectment by an attorney of another Court, is not sufficient ground for a rule (either absolute or *nisi*) for judgment against the casual ejector.

He urged that the tenant was bound by the act of an attorney of another Court, who was the agent of the tenant for this purpose; that the Court would not go out of the way to inquire if a person acting as attorney in such matter was on the roll; and at all events that he was entitled to a rule to shew cause.

**BAYLEY, B.**—If he be not an attorney of this Court, how are we to animadvert upon him? If he has acted wrongfully in the matter, we ought not to grant a rule *nisi*, so as to impose on the party the expense of two rules. It will be very easy to get the declaration accepted by an attorney belonging to this Court.

Rule refused.

The rule was afterwards granted, on an attorney of this Court accepting the declaration.

*Revenue,*  
1832.

GEORGE JACKSON and ANN NESBITT, his wife (since deceased) . . . . . Plaintiffs.

Sir CHARLES FORBES, Bart., LACHLAN MACQUARIE (since deceased), COLIN ANDERSON (since deceased), and CAROLINE ERSKINE, late an Infant, by her Guardian,  
Defendants.

The said G. JACKSON and A. N., his wife . Plaintiffs.

The said L. MACQUARIE, (since deceased) Defendant.

The said G. JACKSON and A. N., his wife, Plaintiffs.

THOMAS FALKNER MIDDLETON and CAROLINE ERSKINE, his wife, late C. E. ANDERSON, an Infant, GEORGE JACKSON JACKSON and JOHN ANDERSON JACKSON, Infants, by their Guardian, and the said Sir C. FORBES, Bart., and L. MACQUARIE (since deceased) . . . Defendants.

The said G. JACKSON . . . . . Plaintiff.

The said Sir C. FORBES, Bart., T. F. MIDDLETON and C. E., his wife, and G. J. JACKSON, J. A. JACKSON, and J. JACKSON, Children of the said Plaintiff G. JACKSON, all Infants out of the Jurisdiction of the Court, J. H. FORBES, M. HALE, and his Majesty's Attorney-General,  
Defendants.

(*By original and supplemental Bills and Bill of Revivor*).

A testator born in *Scotland*, who resided and died in *India*, leav-

ing real and personal property there situate, but no assets in *England*, by his will and testamentary papers, left the whole of his property in equal divisions to his four natural children, or the survivors of them, and their heirs, subject to legacies and annuities. His executors obtained an *Indian* probate, and paid the debts and bequests, and converted the principal part of the estate into money, which they sent to their bankers in *England*, and invested it in the funds in their own names. Proceedings were commenced in *England* against the executors, to determine the claims under the will; whereupon the stock was transferred into the name of the Accountant-General of the Court of *Chancery*, and the Court made a decree ascertaining the shares of the several claimants:—*Held*, that the legacy duty was not payable on legacies or shares of the residue bequeathed.

THIS case was sent for the opinion of this Court by the Lord Chancellor, on the 16th *February*, 1831.

*Colin Anderson*, late surgeon to his Majesty's 75th regiment of foot, deceased, was a native of *Scotland*, and was in his lifetime and at the time of his death seised and possessed of and otherwise well entitled to some real estate in the *East Indies*; and was also possessed of considerable personal estate and effects, all of which, at the time of his death and of making his will and codicils hereinafter stated, were also in *India*.

Revenue,  
1832.

JACKSON  
v.  
FORBES.

The testator was for some time before and until his death resident in *India*, and, being seised and possessed as aforesaid, duly made and published his last will in writing, bearing date the 25th of *October*, 1802, and thereby desired that his house and grounds in the island of *Coolabah*, together with his household furniture, horses, liquors, &c. might be sold at public outcry to the highest bidder, and the produce placed to the credit of his estate; and after noticing that on the 1st of *January*, 1802, he should have assets in *India* to the amount therein mentioned, and that he was entitled to any other division of prize-money which might thereafter be made for *Columbo* and *Seringapatam* as captain, and as major for *Cochin* prize-money, and to whatever might be given to the captors of *Kurree*, on both which services he was head surgeon; and also noticing that there was one boy at home named *Colin Anderson*, born &c.; that there was one girl in *India* named *Jane Jarvis Anderson*, born &c.; that there was one girl in *India*, born &c., named *Ann Nesbitt Anderson*; that there was another girl (*Caroline Erskine*, wife of *T. F. Middleton*) in *India*, born &c.: he left to those children, or the survivors of them and their heirs, the whole of his property in equal divisions, subject to such regulations and legacies as he should thereafter mention; and it was his wish that his brother, Lieutenant *Patrick Anderson*, of the 19th regiment of Light Dragoons, should come to *Bombay* as one of his executors, and take the children then in *India* to *England* with him; and as that duty might put him to

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some expense and inconvenience, the said testator thereby bequeathed to him 500*l.* sterling as some kind of recompense, besides the amount of his passage home, which his (the testator's) executors were directed to pay; and all the expenses which might be incurred in *India* on account of those children, fitting them out for their voyage, the price of their passage home, and other incidental charges which might be thought necessary to their comfort and safety, were to be charged to his, the testator's, estate; and the said testator thereby gave certain annuities to different persons in *England* and in *India*. To provide for those legacies and the education of the children, his executors were thereby directed to place the whole of the estate securely at interest, either on landed property or in some public funds, (those of the *India Company*, perhaps, as safe as any), but he left the choice entirely to his executors, in whose regard to the interest of the children he had implicit confidence; and yearly, after the regular payment of the legacies and the expenses of the children, any remaining balance was to be added to the principal for the benefit of the whole. As the annuitants died, the principal producing such annuity was to revert to the common stock for the benefit of the whole, as the whole of the estate was to be equally divided amongst the before-mentioned four children, viz. *John Anderson*, junior, *Jane Jarvis Anderson*, *Ann Nesbitt Anderson*, and *Caroline Erskine Anderson*, or the survivor of them; a regular division must be made of the estate when each came of age or was married; and the share of such person was not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy, subject, however, to the control of his the testator's executors, their heirs and assigns, for nine years more, when he would have arrived at years of discretion, if ever. When the girls, or any of them, became of age or got married, he thereby directed that their shares might be so settled on themselves

during their lives, and on their children in equal proportions after their death, that it would not be in the power of the husband, if so inclined, to injure either his wife or children. And the said testator's executors were supplicated to take every possible precaution against so distressing an event. Should it be the will of Almighty God to take one or more of those children to himself, the share or shares of such children dying without issue were to be equally divided amongst the survivors; but in case of issue, those children were to inherit the share of their parent amongst them equally; and in case of their dying without issue, it was to return for the benefit of the survivor of those four children or their families. Upon the reversion of any sums to the public stock, the issue of a deceased child was to have the share that its parent would have had if living; but again, if such issue died without issue, the whole of its original and after accruing shares reverted to the common stock. And he thereby constituted, nominated, and appointed his brothers, *Alexander Anderson*, and *Patrick Anderson*, Brevet Lieutenant Colonel *Lachlan Macquarie*, of the 36th regiment of foot, and *Charles Forbes*, of *Bombay*, Esq. (now Sir *Charles Forbes*, Bart.) executors of his said will.

The testator afterwards made and signed a codicil or testamentary paper, dated the 4th of *July*, 1804, and addressed the same in a letter to *Patrick Anderson*, and which was, amongst other things, to the purport or effect following; that is to say, "If I should be so unfortunate as to meet with any accident to prevent my getting to *Bombay* soon, you must endeavour to get leave and go home in charge of these infants, place them at school, and be in some degree their father." And further, in the same testamentary paper or letter he writes, "After fitting out my children for the voyage and paying for your and their passage, the whole of my property in *Bombay* I would have lodged in the Company's funds, and the expenses of

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the children's education, together with such other legacies as I have mentioned in my will, to be defrayed out of the interest of this money, and any surplus which may remain after defraying their expenses is annually to be added to the principal until the children are of age." And further, in the same testamentary paper or letter he writes, "I have half a lack of rupees, more or less, with Messrs. *Harrington, Burnaby, & Harrington*, at *Madras*, which, as they have lowered the rate of interest, I have directed to be remitted to Messrs. *Cotterill, Trail, Palmer & Co.* of *Calcutta*. This sum, if possible, I wish to allow to accumulate for eight or eleven years, when it will enable me, if alive, to keep a carriage for my daughters, and if I die it will make their portions so much the better. If I get safe to *Bombay*, I expect that you will exert yourself to get leave and come and stay with me until I go to *Europe*, or as long as you can."

The testator afterwards made and signed another codicil or testamentary paper as a letter addressed to the said *Patrick Anderson*, containing, among other things, as follows:—"After fitting out the children for the voyage, paying your own and their passage to *England*, and procuring bills for their expenses for the two first years, besides paying the sums I have already mentioned and those to be mentioned hereafter, be pleased to lodge the whole of my property at *Bombay*, when an opportunity occurs, in the Company's next good loan."

The testator afterwards made and signed another codicil or testamentary paper, dated on board the *Candidate*, off *Kedgere*, the 21st *July*, 1804, and addressed the same as a letter to the said *Patrick Anderson*, containing, among other things, as follows:—"I wish you to go home with the children, as you can endeavour to get on in the army at the same time. General *Lake* will hardly refuse you leave, when you tell him that the father of these children served his Majesty thirty years, and that they are deprived

of the protection and instruction of a mother, depending solely on your and their relations at home."

The testator added the following statement to such last-mentioned letter or testamentary paper, and signed the same; that is to say, "Messrs. *Forbes & Co.* of *Bombay*, receive the interest half-yearly of the three notes into which the opposite of 32,000 rupees was divided or opposed to the name of each child, at 9*l. per cent. per annum*, until they can place it to more or equal advantage in the funds of the Honorable *East India Company*. I wish these sums to continue accumulating until each progressively shall amount to 8000*l.* sterling, the expenses of maintaining and educating these children in the meantime to be defrayed by me, or at my expense. The reason why I have made this separate provision for these children is, that they may be independent of me in case I should be blockhead enough to marry at my time of life, and perhaps have more children; but in the event of my death without an increase of family, my will, which is in the possession of the mother of the infants named on the opposite page, will shew the manner in which whatever property I may die possessed of is to be distributed, including the opposite rupees 32,000, with its interest. I have paid for a cornetcy for *C. Anderson*, junior, in his Majesty's 19th regiment of Light Dragoons, on the 29th of *September*, 1802. Of course, in case of my death, an equal amount of my property, with its interest from that day, will be credited to each of the girls, and the remainder then equally divided amongst the four children, or the survivors of them, agreeably to the tenor of my will.

*C. Anderson.*

"Lodged in the Treasury, at *Bombay*, of the *East India Company*, 32,000 rupees, as a loan at 8*l. per cent.*, the interest payable at *Bombay* half-yearly, for the sole use and benefit of the under-mentioned children, and in the proportion set down opposite to their names:—

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<i>Jane Jarvis Anderson</i> . . . . .	18,600
<i>Ann Nesbitt Anderson</i> . . . . .	10,205
<i>Caroline Erskine Anderson</i> . . . . .	8,195
	<hr/>
<i>Bombay rupees</i> . . . . .	32,000

Ditto, ditto, lodged in ditto 5000 rupees at the same rate, and payable in the same manner, for the support of the mother of those children; when she dies the principal will revert to me or my heirs, &c. . . . . 5,000."

The testator departed this life on or about the 28th day of *July*, 1804, at sea, while on a voyage from *Calcutta* to *Bombay*, without having revoked or altered his will and codicils.

The testator left the four children before referred to, who were all illegitimate; that is to say, *Colin Anderson*, *J. J. Anderson*, *A. N. Anderson*, and *C. E. Anderson*.

All the testator's children, except the eldest, were at the time of his death resident at *Bombay*.

By letters patent under the great seal of *Great Britain*, bearing date at *Westminster*, the 28th of *February*, in the thirty-eighth year of the reign of his late Majesty King *George the Third*, being the charter for establishing the courts of Recorder of *Madras* and *Bombay*, in the *East Indies*, his Majesty was pleased to grant, order, establish, and appoint, that the Court of the Recorder of *Bombay* should be a court of ecclesiastical jurisdiction within *Bombay* and the limits thereof, and upon *British* subjects there residing, with the same powers, authorities, and privileges, and subject to the same restrictions, as are thereinbefore given, granted, or mentioned unto or as to the court of Recorder of *Madras*.

By the said charter it was, amongst other things, granted, ordained, established, and appointed, that the court of the Recorder of *Madras* should be a court of ecclesiastical jurisdiction, and should have full power and authority to

administer and execute within *Madras* and the limits thereof, and towards and upon *British* subjects there residing, the ecclesiastical law as the same was then used and exercised in the diocese of *London*, so far as the circumstances and occasions of *Madras* and the people would admit or require; and for that purpose was given to the said court full power and authority to grant probates, under the seal of the said court of the said Recorder of *Madras*, of the last will and testament of all or any of the said *British* subjects dying and leaving personal effects within the said territories or districts respectively, and to demand, require, take, hear, examine, and allow, and, if occasion require, to disallow and reject the account of them, in such manner and form as was then used and might be used in the said diocese of *London*, and to do all things needful and necessary in that behalf.

In conformity with the provisions of the said charter and orders and regulations of the said court of the Recorder of *Bombay*, the defendant Sir *C. Forbes*, the said *P. Anderson*, and the said *L. Macquarie*, obtained probate of the said will and codicils from the court of the Recorder of *Bombay*.

Under the directions and authority of the said will and codicils, the said Sir *C. Forbes* and his co-executors (who have both since departed this life) possessed the testator's house and land, and sold the same, and collected and got in all the testator's goods, chattels, and effects, and converted the principal part thereof into money; and they paid all his debts and legacies, and paid the annuities given by the said will as they became due; and the residue of the said testator's estate which they so converted into money, was invested by them in the public funds in the manner hereinafter mentioned.

In the year 1805, *P. Anderson* proceeded to *England* with the three youngest children of the said testator, and

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he took with him part of the testator's assets; and on the 12th of *November*, 1811, Sir *C. Forbes*, on behalf of himself and the said *P. Anderson*, (the said *L. Macquarie* being absent and never having intermeddled with the said testator's estate and effects,) and, pursuant to the rules and regulations of the Recorder's court of *Bombay*, rendered unto the Recorder of the said court an account of the administration of the said testator's estate and effects by the executors, and the same accounts were examined and passed as approved of by the said court.

Previous to Sir *C. Forbes*' departure from *Bombay* for *England*, which was in the month of *November*, 1811, the balance appearing by the said account to be due to the said testator's estate was remitted by him to Messrs. *Porcher & Co.* in *London*, as the agents and bankers of the said executors, and they afterwards accounted for the same to the said Sir *C. Forbes*.

Sir *Charles Forbes*, and his co-executor, *Patrick Anderson*, collected, got in, and administered the said testator's goods, chattels, and effects as aforesaid, and invested the residue or a principal part of such residue in Bank *3l. per cent.* Annuities, in the joint names of the said *Patrick Anderson*, *L. Macquarie*, and Sir *C. Forbes*.

*Colin Anderson*, the son, attained his age of twenty-one years in the year 1809, and a separate account was kept with him of sums paid and expended on his account; but no distribution of the testator's residuary estate was made in the lifetime of the said son. And the said Sir *C. Forbes* continued to make payments on his account, and to maintain the other three children out of the interest or dividends arising from the testator's estate.

In the month of *March*, 1819, the testator's eldest daughter, *Ann Nesbitt Anderson*, (she being then an infant), intermarried with the plaintiff, *George Jackson*.

The said executors never applied for or obtained pro-

bate to be granted of the said testator's will by the Prerogative Court of *Canterbury*.

On 20th *May*, 1819, *George Jackson*, the above-named plaintiff, and *A. N.*, his wife, (and which said *A. N. Jackson* was one of the said children of the said testator, and is since deceased), filed their original bill of complaint in the High Court of *Chancery* in *England*, against the said *C. Forbes* (now *Sir Charles Forbes*, Bart.), *Colin Anderson*, (since deceased), and *Caroline Erskine Anderson*, afterwards the wife of the said *T. F. Middleton*, but since deceased, also against *L. Macquarie* (who was then out of the jurisdiction of the Court, and since deceased), thereby stating the said will and codicils, partly to the effect hereinbefore stated. And further stating the death of *C. Anderson*, the testator, leaving *C. Anderson*, *A. N. Anderson*, *J. J. Anderson*, and *C. E. Anderson*, the residuary legatees named in the will and codicils, him surviving. It then stated the proof of the will and codicils by all the executors in *India*, and erroneously stated that *Sir C. Forbes* had proved the same in the Prerogative Court of *Canterbury* in *England*. It stated the death of *J. J. Anderson*, an infant, and unmarried; the payment by the executors of the maintenance and education of the plaintiffs *A. N.*, and the defendant *C. E. Anderson*, and the purchase of a commission by them for *C. Anderson*; that the residuary estate had been laid out in stock; that 49,900*l.* Bank 3*l.* per cent. Annuities so purchased stood in the Bank books in the executors' names; that *P. Anderson* was dead; that *C. Anderson* had attained twenty-one; that *C. E. Anderson* and *A. N. Jackson* were infants, the latter married in *March* last to plaintiff *Jackson*; that marriage articles had been made before the marriage for settling the uncertain interest of *A. N. Anderson*, under the will and codicils to the effect therein stated.

The bill then prayed that the rights and interest of the

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said plaintiff *George Jackson*, and the said *A. N. Jackson*, in right of the said *A. N. Jackson*, and of all parties to and in the residuary estate and effects of the said testator, might be ascertained and declared by the Court; and that the share and interest of the said *A. N. Jackson* might be transferred into the names of the trustees of the said marriage articles, upon the trusts of the said marriage articles; and, if necessary, that accounts might be taken of the estate and effects of the said testator and of his debts, and the legacies and annuities given by his will; and that such residue, and the share of the said *A. N. Jackson* thereof, might be ascertained, and an account taken of the interest and dividends of the said *A. N. Jackson* therein, which had accrued due, and that the same might be paid to the said plaintiff, *George Jackson*; and that all proper accounts might be taken and directions given for effecting the purposes aforesaid.

The defendants, except *L. Macquarie*, who was out of the jurisdiction of the Court, appeared and put in their answers thereto; and the said Sir *C. Forbes* by his said answer admitted only that the said will and codicils were proved in the Recorder's court of *Bombay*; and that he and his co-executor, *Patrick Anderson*, had got in and received the personal estate and effects of the said testator, and had remitted the same, together with the proceeds of his house and lands at *Coolabah*, which they had sold, to *England*, and that they had paid and discharged the testamentary expenses of the testator, and his debts and legacies given by his will, and had kept down the annuities bequeathed thereby, and they admitted that the residuary estate of the said testator had been laid out in the purchase of stock in the public funds, and that there was then standing in the names of the said *P. Anderson*, (then deceased), *L. Macquarie*, and Sir *C. Forbes*, in the books of the Governor and Company of the Bank of *England*, 40,900*l.* Bank 3*l.* per cent. Annuities, which had been

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purchased with such residuary estate. And that there was, in the hands of the said Sir *C. Forbes*, a balance of cash. And he said he was unable to determine the rights and interests of the plaintiff *A. N. Jackson*, and the other persons interested under the will and codicil of the said testator; and he therefore claimed the directions of the Court in that respect. And he submitted to act as the Court should direct.

The said cause came on to be heard before the Master of the Rolls on the 25th *April*, 1820, when it was referred to the Master to take an account of the personal estate of the said testator not specifically bequeathed, come to the hands of the said Sir *C. Forbes*, or of any person or persons by his order, or for his use, and also an account of the said testator's debts, funeral expenses, legacies, and annuities; and that the said testator's personal estate not specifically bequeathed, should be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of his legacies and annuities; and that the Master should ascertain the clear residue of the said testator's personal estate; and the usual directions were given for taking the said accounts; and the consideration of all further directions and of the costs of the suit was reserved until after the Master should have made his report.

The executors made various payments out of the said testator's estate to *Colin Anderson*, the son, and towards the support and education of the said testator's daughters; by which means the said Bank Annuities became eventually reduced to the 36,000*l.* Bank 3*l. per cent.* Annuities hereinafter mentioned.

After the decree of 25th *April*, 1820, *L. Macquarie* was brought before the Court as a defendant by supplemental bill; and *Caroline Erskine Anderson*, with the approbation of the Court, intermarried with the defendant *T. F.*

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*Middleton*, and articles for a settlement were thereupon entered into with the approbation of one of the Masters of the Court of *Chancery*. The plaintiff, *George Jackson*, and his said wife having had two children, namely, *George Jackson Jackson*, and *John Anderson Jackson*, they, the said *George Jackson* and *A. N.* his wife, in or as of *Hilary Term*, 1823, filed their supplemental bill against the said *T. F. Middleton* and *C. E.* his wife, and the trustees of the said marriage articles, and also against the said *G. J. Jackson*, and *J. A. Jackson*, for the purpose of bringing the said several parties before the Court; which supplemental cause having come on to be heard, the usual decree was made therein.

On the 25th *October*, 1824, the Master, to whom the original and supplemental causes stood transferred, made his general report therein of that date, whereby he found that no creditor had come in to prove any debt in pursuance of advertisements in the *London Gazette* and other public papers for that purpose; and that the legacies of the said testator were all paid, and were included in the schedules to his report, and also certain annuities, all of which had lapsed by the death of the annuitants, except an annuity of 720 rupees, payable monthly to *Mrs. Mary Burchall*, the mother of the testator's children, and who was resident at *Bombay*, for the term of her life, and an annuity of 50*l.* to *Mary Thompson*, a niece of the testator, resident in the county of *Dublin*, determinable on her death or marriage. And he found that the defendant, *Sir C. Forbes*, and the said *Patrick Anderson*, by virtue of the said probate granted in *India*, collected and got in the testator's effects in *India*, and administered the same in *India* jointly, until the 14th of *February*, 1805, when the said *Patrick Anderson*, pursuant to the directions contained in the said will and testamentary papers of the said testator, proceeded with the said three female children of the said testator to *Eng.*

*land*; and that the said Sir C. Forbes continued in *India* after the said *Patrick Anderson* left *India* for *England* as aforesaid, and administered the estate and effects of the testator in *India*, and collected and got in such parts thereof as were not taken by the said *Patrick Anderson* with him to *England*; and that on or about the 12th of *November*, 1811, the said Sir C. Forbes, on behalf of himself and the said *Patrick Anderson*, pursuant to the rules and regulations of the Recorder's court at *Bombay*, rendered an account of the administration of the testator's estate and effects in *India* by him and the said Sir C. Forbes jointly and separately, and which account commenced on the 1st of *August*, 1804, and ended on the 31st of *August*, 1811; and the Master adopted and allowed an official or notarial copy thereof as an account of the administration of the testator's estate in *India*; and the balance of which, amounting to the sum of 2,407*l.* 12*s.* 7*d.* is accounted for as a receipt in *England*, on 23rd *January*, 1813, and as such is included in the first schedule to the said report under that date. And the Master thereby further found, that the said Sir C. Forbes, jointly with the said P. Anderson, by themselves and their agents, between 18th *December*, 1809, and 31st *December*, 1818, received of the personal estate of the testator several sums of money amounting together to the sum of 41,074*l.* 13*s.* 10*d.*, as appearing by the first schedule to his report; and against which he also found that they had made certain payments and disbursements, as appearing by the second schedule to his report. And the said Master further found that the said defendant, Sir C. Forbes, had, since the death of his said co-executor, *Patrick Anderson*, by himself and his agents, received of the testator's personal estate several sums, appearing by the said first schedule to amount to the sum of 25,216*l.* 7*s.* 7*d.*, and had also paid and disbursed various sums as by the said second schedule also appeared. And the said Master further

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found, that the said Sir *C. Forbes* was allowed in the said second schedule a sum of 4000*l.* set apart as a capital sum bearing compound interest in the hands of the said Sir *C. Forbes* and his agents for the purposes of securing the annuity to the said *M. Thompson* and the said annuity to the said *M. Burchall*; and that the same, subject to such annuities, was subject to the general trusts of the testator's will; and that, with the said compound interest received, the same then amounted to the sum of 5,018*l.* 12*s.* 10*d.*, as appeared by the third schedule to the said report; and after referring to payments made in respect of the said annuities, as appearing by the fourth schedule to the report, and stating that the said Sir *C. Forbes* had claimed to be allowed several sums paid for maintenance, education, and advancement of the testator's children, but which the Master had not thought fit to allow, as not falling within the scope of the inquiries directed by the decree, the said Master certified, that the clear residue of the said testator's personal estate then consisted of the sum of 36,000*l.* 3*l.* per cent. Consols, standing in the names of the said *P. Anderson*, deceased, *L. Macquarie*, deceased, and the said defendant, Sir *C. Forbes*, and of the sum of 30,683*l.* 0*s.* 5*d.* then due from the said Sir *C. Forbes*, subject nevertheless to the said two annuities.

The legacy of 50*l.* to the said *Patrick Anderson*, and the legacy of 50*l.* to the said Sir *C. Forbes*, and the said legacy of 50*l.* to the said General *Macquarie*, and the legacy of 50*l.* to the said *Alexander Anderson*, and the value of a lieutenancy to *Colin Anderson*, viz. 564*l.* 2*s.* are allowed as disbursements to the said Sir *C. Forbes*; and the legacy duties on such legacies, and also on the value of the annuities to the said *M. Thompson*, *A. Anderson*, *I. Thompson*, and *I. M'Dougal*, are also allowed as payments by the said Master in the second schedule to his said report; but nothing in respect of probate duty, and no other

payments in respect of the legacy duty are claimed or allowed.

The said *Colin Anderson* having died intestate and illegitimate on 22nd *June*, 1822, the Attorney-General was brought before the Court by supplemental bill in respect of the interest of the said *C. Anderson* in the said trust-funds.

The said *Jane J. Anderson* having also died intestate and without issue on 19th *April*, 1812, letters of administration to the said *C. Anderson* and *J. J. Anderson*, limited to the purposes of the suit, were granted to *J. H. Forbes*.

The said *A. N. Anderson*, another of the said children, who had intermarried with the plaintiff, *G. Jackson*, afterwards died leaving several children, and having made a will; and a bill of revivor and a supplemental bill were filed to revive the suit and to make her children defendants.

On 7th *July*, 1829, the plaintiff and the defendants, *T. F. Middleton* and *C. E.* his wife, and the said infants, *G. J. Jackson*, *J. A. Jackson*, *A. Jackson*, and *J. Jackson*, presented their petition to the Master of the Rolls in all the said causes, stating as thereby appeared, and praying for payment of certain advances for maintenance of the said *A. N. Jackson* and *C. E. Middleton* out of their shares of the said trust funds.

On 17th *July*, 1829, the three first-mentioned causes came on to be heard before the Master of the Rolls for further directions, and as to the matter of costs reserved by the said decree; and the said petition and the said supplemental suit coming on to be heard at the same time, his Honor did order that it should be referred to the Master to whom these causes stood referred, to inquire and state to the Court what sum ought to be set apart to answer the two several annuities of 15*l.* and 750 rupees in his said report mentioned; and his Honor did declare, that accord-

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ing to the true construction of the testator's will, the said *J. J. Anderson, A. N. Anderson, and C. E. Anderson*, the three residuary legatees, who were girls, were in no event to take more than an interest for their respective lives; but that *C. Anderson*, one of the residuary legatees, being a boy, was to take an absolute vested interest on attaining his age of twenty-one years; and his Honor declared, that while all the residuary legatees continued under age and unmarried, the residue of the testator's estate formed an aggregate fund, out of the interest whereof they were to be maintained and educated; and that the surplus interest, after paying the expenses of their maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should be eventually entitled thereto.

The decree then declared the rights of the four deceased legatees, and of their issue, &c. as to the residue of the estate, and directed a reference to the Master to take an account thereof against the executors. That share of the testator's residue which had been invested in 3l. per cent. Consols in the names of the executors, *viz.* 36,000l., had been increased to 47,704l. 3s. 3d. Consols, and stood in the name of the Accountant-General of the Court of *Chancery*, in trust, in the cause of *Jackson v. Forbes*.

Since the said decree, the said defendant *C. E. Middleton* hath died, having had two children, both of whom died in her lifetime, but administration to them hath been taken out by their father, the defendant *T. F. Middleton*, and he hath filed a bill claiming to be entitled to the share of his said wife of the said testator's residuary estate.

The Attorney-General, in *October*, 1830, presented a petition in these causes, praying that it might be declared that his Majesty is entitled to be paid the amount of the probate duty, and of the legacy duty upon the whole of

the testator's estate and effects which were brought or remitted to *England*, or administered or remaining to be administered in *England*; and that probate of the will and codicils of the testator ought to have been taken out from the Prerogative Court of the Archbishop of *Canterbury* upon the same estate and effects, and that directions might be given for obtaining and taking out such probate; and praying the necessary directions for the raising and paying the amount due to his Majesty in respect of the said probate duty and legacy duty.

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The said Sir *C. Forbes* and other parties in this cause, at or about the same time, presented a cross petition in the said cause, praying that the Attorney-General's petition might be dismissed, and that it might be declared that the said executors were not required by law to have obtained probate in this country, and that the testator's estate was not liable to probate duty, and that the residuary estate of the testator collected and alleged to have been appropriated in the *East Indies*, was not liable to duty chargeable upon legacies, annuities, and shares of residue, under the acts of Parliament now in force touching testator's estates got in and distributed under probates of wills granted by the ecclesiastical courts of this country.

The two petitions came on together to be heard before the Lord Chancellor, who ordered that a case should be made for the opinion of the Court of *Exchequer* as to the questions raised.

The questions for the opinion of this Court were:—

1st. Whether the said Sir *C. Forbes* and his co-executors were not bound to have taken out probate from the Prerogative Court of the Archbishop of *Canterbury*, to the testator's will and codicils, before they could legally do all or any and which of the acts hereinbefore stated.

2nd. Whether the said Sir *C. Forbes* and his co-executors

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were not, and whether the said Sir *C. Forbes*, as the survivor, is not, bound to take out probate from the Prerogative Court of *Canterbury*, and to pay a probate duty upon the whole or any and what part of the testator's property collected in *India*, and brought or transmitted to *England* as aforesaid.

*3rd.* Whether the duties chargeable upon legacies, annuities, and shares of residue under the acts of Parliament in force touching such duties upon testator's estates administered in *England*, were and are chargeable in respect of all or any and which of the legacies, annuities, and shares of the residue respectively bequeathed by the testator's will and codicils.

The two first questions relative to the probate duty were abandoned by the Crown, and were struck out of the case.

The *Solicitor-General*, *Wray*, and *Amos*, for the Crown.  
—The fund in *Chancery*, the produce of property in *India*, and belonging to a testator who died there, was remitted to this country by the executors, who received and dealt with it here in their representative character. It was not specifically appropriated in *India*, and the investment in stock by the executors cannot be considered a "payment" to the legatees by the executor within the meaning of the statute 36 *Geo.* 3, c. 52, s. 6. The residuary legatees were in the same situation. The remittance to the agents was in effect a remittance to the executors who dealt with and invested the funds in their own names. The suit in equity was merely for the purpose of securing the assets and ascertaining the uncertain rights of the residuary legatees. At that time a considerable portion of the assets was in the hands of the executor, and therefore was not appropriated; and the legacies were treated as part of the personal estate. [*Bayley*, B.—If the testator had died

in *Ireland*, having only *Irish* property and *Irish* debts, and his executor had taken out a *Dublin* administration, could the *English* legacy duty have been claimed if he had afterwards come over to this country and vested the assets in the *English* funds, on trusts for the testator's children? Lord *Lyndhurst*, C. B.—Do not the circumstances of this case amount to an appropriation of the sums to the legatees, subject to outstanding claims? The assets were wholly unadministered, and remained in the hands of the executors for the payment of debts; the executors, therefore, retained their character, as such, *quoad* the fund, and there was no appropriation. [Lord *Lyndhurst*, C. B.—Suppose the money had remained in *India* and the legatees in this country had filed a bill against an executor here; in that case the money would have been paid in this country; would the legacy duty then have attached?] The decree, in effect, ascertains that the funds were not appropriated; for if the assets did not remain a general unappropriated personal estate of the testator, liable to his debts and legacies, the Court must have been in error in making the common decree, and would have said this is a trust-fund appropriated to the benefit of particular legatees as *cestui que trusts*. In 1829, the decree of the Court declared the rights of the parties; has there, since that time, been any act of appropriation? In *Logan v. Fairlie* (a), the legacy duty was held payable, though the acts of appropriation by the executor in *India* were much stronger than in this case, he having, as far as he could, separated the sum remitted to *England* from the testator's assets, and appropriated it to the legatees by directing his *English* agent to pay one moiety to one legatee, and the other to the other, or her children. [Lord *Lyndhurst*, C. B. The institution of a suit in *Chancery* can make no difference. If this fund, after payment of all debts in *India*, had

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(a) 2 Sim. & Stu. 284.

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been sent by the executors in *India* to their bankers here, to be paid to the different parties entitled to shares according to their respective rights, and no doubt had existed as to those rights, would the payment by the bankers in equal divisions to ascertained legatees here have made it liable? Would the executors' order to their bankers to apportion the fund to the four legatees, and their payment to them in consequence, have made it a payment liable to legacy duty? The sum bequeathed would, in both cases, be equally liable to pay the testator's debts. If the fund is found in this country undivided, you say that by the division here it becomes liable to legacy duty, but the Court of *Chancery* is the mere medium of ascertaining the shares. The property is as much administered by the executors without as with the aid of that Court.] In the cases of *Attorney-General v. Cockerell* (a), and *Attorney-General v. Beatson* (b), the wills had been proved in this country. It is true that circumstance is wanting in this case: it was, however, assumed in *Logan v. Fairlie*; and here also the like assumption must be made, before the Court of *Chancery* can have a power over the personal representative.

Sir Charles Wetherell, Barber, and Garratt, for the defendants.—The effect of the present argument for the Crown is, that property in every foreign country would be liable to legacy duty, if the legatee or executor either came to *England*, or shifted the fund here. According to the argument, if a foreigner make an executor who comes to this country or invests the fund left by his testator here, legacy duty would be payable equally as if the property had been originally situate within the province of *Canterbury*, and the testator had lived and died in

(a) 1 Pri. 165.

(b) 7 Pri. 560.

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*England.* But the simple answer to this is, that an act of Parliament cannot apply to such a case without express words. The statute 36 *Geo.* 3, c. 52, according to its general import, might include the property of an *English* subject living abroad; but every enactment in it implies that the property contemplated shall be situate, and its owner resident, in *Great Britain*; and that his assets shall be distributed under an authority derived from a *British* Court. Again, the control exercised over the executor under section 6 of the act implies that he is under *British* jurisdiction, and section 2 applies to wills, the probate of which belongs to the Ecclesiastical Courts in *England* or *Scotland*, and not to the like jurisdictions in *India*. The question is, whether this act has force over all property in the King's foreign dominions? And the answer must depend not on the accidental circumstance of the money being paid here, or the caprice of a foreign executor, who may or may not come here, but on the territorial limits within which this act is to operate. By section 6, the executor is the party made liable to the Crown for the duty; but if the executors had never come within the jurisdiction of the *English* Courts, or, having collected the assets in *India* under the *Indian* administration, had sent over the legacies to the legatees here, how could they be made amenable? For the remedy is only personal against them when here. The consequence of the argument for the Crown would be, that no duty would be payable if the will were clear; whereas, if it were doubtful, so as to render it necessary to apply to a Court of equity to interpret the will, the duty would attach.

[Lord *Lyndhurst*, C. B.—It is not contended that duty would be payable if a specific appropriation had taken place abroad; as for instance, if a specific sum had been sent to each legatee; but they contend, that if the money were sent to a banker, and afterwards an order should

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be given to that banker to pay it over to legatees, it would then be liable to duty. *Bayley, B.*—In the case put of appropriation abroad, the payment of duty would depend not on the person to whom the legacy is to be paid, but on the executor's coming within the jurisdiction, or the reverse.]

The liability to duty depends, according to the argument, upon the caprice of the personal representative and the accidental presence of the executor in this country.

In the *Attorney-General v. Cockerell*, and *Attorney-General v. Beatson*, the representatives derived their authority from an *English* Court; but distinctions may be drawn between a liability to probate and legacy duty; *Re Ewin (a)*, *Attorney-General v. Dimond (b)*; and that circumstance will not decide this question.

But it is said, that the decree of the Court of equity renders this fund liable to legacy duty. According to that argument, the liability to the duty might depend, not upon the construction of the act, but upon the contingency, whether the executor is or is not satisfied that debts exist.

The property is *Indian*; the title of the executor arises there: and the circumstance of the fund being afterwards accidentally in this country, cannot make a duty attach, to which, if it had remained in *India*, it would not have been liable.

The *Solicitor-General* replied.

The Court took time to consider, and afterwards sent the following certificate to the Lord Chancellor:—

This case has been argued before us by counsel. We have considered it; and are of opinion, that the duties, &c.

(a) *Ante*, Vol. 1, p. 151.

(b) *Ante*, Vol. 1, p. 356.

were not chargeable in respect of any of the legacies, annuities, and shares of residue bequeathed by the testator's will and codicils.

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KENDRICK v. LOMAX.

**ASSUMPSIT** on a bill of exchange for 35*l.*, drawn by one *Wellings*, upon, and accepted by defendant, payable at *Esdailes'*, bankers, *London*, and indorsed by *Wellings* to one *Blundell*, and by *Blundell* to the plaintiff.

Pleas—*First*, general issue—*Secondly*, that defendant gave to plaintiff, who accepted and received the same, another bill of exchange, not then due, for the same sum of money, in satisfaction and discharge of the promises, &c., and of all damage sustained by the plaintiff, by reason of the non-payment of the bill in the declaration mentioned. *Thirdly*—Acceptance of another bill in place of the one declared on.—*Fourthly*, that defendant gave, and plaintiff accepted and received, another bill for and on account of and in renewal of the first. The replication to the special pleas traversed the receipt of the second bill in manner and form stated in those pleas.

At the trial, before *Bayley*, B., at the Spring Assizes for the county of *Warwick*, the following appeared to be the facts of the case:—All the parties to the bill of exchange in the declaration mentioned resided at *Birmingham*. *Blundell*, the indorser, at the request of *Wellings*, the preceding indorser, went to *Kendrick*, the plaintiff, a few days after the bill became due, it having been sent to *London* to be presented for payment, and told the plaintiff

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After a bill of exchange became due, and whilst it was in *London*, where it had been sent for presentment for payment, the person who had indorsed it to the plaintiff came to him with another bill for the same amount, and prevailed on him to take it for and on account of and in renewal of the first bill. Before the second bill became due, and without delivering it back, the plaintiff brought an action upon the first bill against the acceptor:—*Held*, that he could not recover even the expenses of noting and postage.

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that he had got another bill, with the same parties' names, and requested him to renew the first bill by taking the second. The plaintiff hesitated some time, but ultimately *Blundell* gave him the second bill, and told him, when the first came back, that he should take it to *Wellings*, who would pay the expenses; to which plaintiff replied, "very well." The bill appeared to be noted, and there was evidence that the expenses of postage and noting on similar bills amounted generally to about 4s. 6d.

The second bill became due, and was duly paid, after action brought, and before the trial. On this evidence, the learned Baron thought that the second plea was not proved, as the second bill for the same sum could not be a satisfaction for that sum and the damages. But he intimated, that such a receipt of the second bill would prevent the plaintiff's right of suing on the first bill, until the second was dishonoured; and he left it to the Jury to say whether the second bill was given by the defendant and received by the plaintiff, for and on account of and in renewal of the first; and the Jury found that it was. The learned Baron told the Jury, that he thought the plaintiff entitled to recover the expenses on the bill, and directed them to find a verdict for the plaintiff for those expenses; a verdict was accordingly found for the plaintiff for the expenses, with leave to the defendant to move to enter a nonsuit.

*Adams*, Serjt., having obtained a rule accordingly—

*F. Pollock*, *Goulburn*, Serjt., and *Amos*, shewed cause. —The second bill cannot be treated as a satisfaction of the first bill and expenses, or as a renewal of the first bill, as far as relates to the expenses. At most, it was only a renewal *pro tanto*.

[*Bayley*, B.—One question may be, whether, on this declaration, in the ordinary form, not laying the expenses as special damages, you can recover the noting or postages.]

Principal, interest, and expenses, are all recoverable as damages. It is expressly laid down in the books, that the expenses of noting are recoverable (a).

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[*Bayley, B.*—Do you know a single instance in practice? I have inquired from Lord *Tenterden*, perhaps the highest authority in the world on this subject, and he says it never is allowed.]

The postages may be recovered as damages, which it is notorious to the Jury, that the plaintiff must be put to, on the dishonour of a bill; and it was not necessary to state by way of special damage, what the jury must know to be the usual and constant expenses which the plaintiff must suffer. Interest and expenses are claimed and allowed in every banker's account.

[*Bayley, B.*—In *Kearslake v. Morgan* (b), it was admitted by the counsel, that the acceptance of the note was not, at all events, an extinguishment of the debt; but it was put, that the acceptance of a negotiable instrument, for and on account of a debt, must be taken *prima facie* to be in satisfaction of that debt, unless it appeared that the note still remained unpaid in the possession of the plaintiffs, without any laches by them. This view of the case was adopted by the Court. In an action on a foreign bill, is it not usual to insert a claim in the declaration for protest, re-exchange, &c.? *Bolland, B.*—I have always heard the distinction, as to recovering those expenses, taken between foreign and inland bills.]

In the case of an inland bill, the noting is of no use; and that may have been a reason for not allowing it on inland bills. It is usual, however, for the Master in the *King's Bench* to allow these charges in computing the principal and interest on a judgment by default.

*Adams, Serjt., contra.*—There was no evidence of any

(a) Chitty on Bills, 541.

(b) 5 T. R. 515.

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damages, not even of the 9d. for postage. The Jury found their verdict simply on what was or might be the ordinary expense. It is very probable that these expenses never were paid by the plaintiff. These charges are not recoverable at all; and it is the uniform practice at *Nisi Prius* not to allow them. But, even if they were, they could only be recovered if specially laid in the declaration. Whenever the damages sustained do not necessarily arise from the act complained of, and consequently are not implied by law (a), the damages must be specially stated in the declaration; now, postage is clearly not a necessary damage resulting from the non-payment of a bill. Parties may be living in the same town: and in very many cases no notice is sent by the post. Suppose that a special messenger was necessarily sent, and that a charge for such an expense were recoverable, would it be possible to recover it without laying such damage specially in the declaration? These are not damages necessarily arising from the dishonour of the bill, but from other contingent circumstances, depending on the bill, such as the liability of other persons, and the place of their residence. Even then, if the plaintiff could have here recovered upon the bill, he could not have recovered these charges, unless they had been stated specially upon the declaration.

But, supposing that, in an action upon the bill, these charges could be recovered, where the plaintiff has a right to recover upon the bill, still, when the right to recover the principal is gone or suspended, there can be no right to recover what is merely the accessory. In *Dixon v. Parkes* (b), the obligee of a *respondentia* bond had re-

(a) 1 Chitty's Pl. 388.

(b) 1 Esp. 110. But see *Hellier v. Franklin*, 1 Starkie, 291, cor. Lord *Ellenborough*, C. J., where the plaintiff recovered, with leave to the defendant to move. The

point was not, however, moved. It will be observed, that the argument for the plaintiff in *Hellier v. Franklin* would not apply to the case in the text.

ceived the principal after it was payable, and in an action on the bond, the defendant pleaded *solvit post diem*; and Lord *Kenyon* ruled, that, in that form of action, the plaintiff could not recover the interest, having received the principal. He said "that the Jury gave the interest in the form of damages, but there must be something to support them—that the principal being gone, every thing founded on it must go too; therefore, no damages could be given in that case." So, in the present case, the right to the bill being gone or suspended, the right to the accessory damages must be gone or suspended likewise.—He was then stopped by the Court.

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BAYLEY, B.—The Court is quite satisfied. A bill of exchange becomes due about the 7th *January*, and another bill of the same amount, dated the 5th *January*, is handed over to the party holding the first bill, for and on account of and in renewal of the first bill. Before the bill so handed over becomes due, the action is brought on the first bill. Now, the second bill being a negotiable instrument, I think that, on the general issue, the plaintiff would be precluded from recovering on the first bill, until he makes out satisfactorily that the defendant cannot be liable on the second; and that he virtually undertakes not to sue on the first, until he has delivered up the second. Can he, then, in the intermediate time, be entitled to recover in respect of noting and postages, the charges upon the bill. Without deciding how that might be in general, I think that, under the particular circumstances of this case, the plaintiff is not so entitled. The party who handed over the second bill to the plaintiff seemed to be aware that he might have a charge for those expenses; but there was a difficulty in knowing what the amount would be, and therefore he told the plaintiff, when the first bill comes back, carry it to *Wellings*, and he will pay you the expenses. Now, admitting that the plaintiff was entitled

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to these expenses, and that, if he had asked for them from *Wellings*, and had returned the second bill, he might have recovered them, still I think that, when he takes the second bill, he virtually agrees, not only to postpone his right to sue on the first bill, but also to sue for the charges which are accessory to it. I know no instance of an action for interest or costs or charges as accessories, when you could not maintain an action for the principal.

As, therefore, the plaintiff was restricted from suing for the amount of the first bill, until he should have delivered up the second, and so was not in a situation to sue on the first bill, he could not sue for the charges which are merely accessory.

I am very much disposed to think, from the inquiries I have made from those most likely to be correct, that it is not the practice to allow these charges, and that they cannot be recovered unless they are laid specially in the declaration. My brother *Adams* has quoted a text writer, who properly states the rule on this subject to be, that the damages must be laid specially, unless they necessarily result from the injury to the plaintiff. Even then, these damages could, perhaps, only be considered as accessory to the principal cause of action. But what damages necessarily resulted here? The holder was not bound to note the bill, and *non constat* that there were any expenses on it; it does not necessarily follow that there should be any expense in returning the bill. The holder may be going into the country, and may make the communication there. It may be that not one sixpence of the expense has been incurred; and, therefore, as it cannot be said that these expenses have been necessarily incurred, I think that the plaintiff cannot recover the expenses on this declaration.

VAUGHAN, B.—I am of the same opinion. It does not of necessity result that these charges should be incurred.

Where they do arise, they are an accretion to the principal, and, when the principal fails, they must fail too.

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BOLLAND, B.—I think that, in this case, the plaintiff cannot recover, for the reasons already given by the Court. I have always heard it stated, that, if there was no count specially stating them, these charges could not be recovered. Interest is clearly different. It flows out of the contract, by which, if I am kept out of my money, I am entitled to interest by way of damages; and this appears by the contract, because the instrument points out the time when I am to be paid.

Rule absolute.

SHELTON v. LIVIUS.

**ASSUMPSIT.**—The first count stated, that a crop of corn, to wit, ten acres of wheat, was, amongst other things, put up and exposed to sale by and on behalf of one *Mary Haseldine*, under and subject to certain conditions of sale, which were set out therein: and that, at the time and on the occasion of such exposing and putting up to sale, the plaintiff became the purchaser of the said crop of wheat, at a certain price, and on the conditions aforesaid; and that thereupon, afterwards, in consideration of the premises, and that the plaintiff, at the request of the defendant, had bargained and agreed to sell the said ten acres of wheat to the defendant, on the terms and conditions aforesaid, at the rate &c. of 7*l.* 10*s.* per acre, under and subject to the performance by him, the defendant, of the conditions aforesaid, he, the defendant, undertook &c. to accept and receive &c., and to perform &c., the conditions, &c.; the count then stated, that the defendant paid a de-

The printed particulars under which a sale by auction proceeds, cannot be varied by parol evidence of the verbal statement of the auctioneer at the time of the sale, either as to the parcels or quality of the subject matter of sale.

It makes no difference, that the question arises on a sub-sale of the same subject-matter by the purchaser.

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posit of 5*l.*, and alleged for breach, the non-acceptance of the crop, and the non-payment of the remainder of the price. The second count was on an agreement to sell the crop of wheat, without noticing the prior sale to the plaintiff—Breach, non-acceptance and non-payment, as in the first count. The third count was in *indebitatus assumpsit*, for crops of wheat, and goods and chattels bargained and sold. Plea—the general issue.

At the trial, before *Vaughan*, B., at the last *Lent* Assizes for the county of *Bedford*, the following appeared to be the facts of the case: The auctioneer employed by Mrs. *Haseldine* to sell the crops in question, sold them by the conditions of sale (some of which were stated in the first count of the declaration), and by a printed hand-bill, which contained a catalogue and a specification of the particular lots. Amongst the conditions of sale, numbers 6 and 7 were as follows:—

6. The amount of acres specified in the catalogue shall, in every case, be considered as more or less; and no mistake as to the description of the lot, whether as to quantity or any other error, shall vitiate the sale thereof.

7. The barns and yards shall be apportioned for the use of purchasers, after the sale of the wheat. Purchasers to have the use of the barns, but the purchasers to the greatest extent to have the preference: each purchaser to be allowed proper time for threshing, according to the quantity bought.

In the hand-bill, lot 6, the one in question, was described as “ten acres of spring wheat (more or less), an excellent crop on the further hill; lot 15 was described as the “Keep of *George's* field until *Old Michaelmas-day* next.” And, at the bottom of the hand-bill was the following memorandum—“Credit will be given until the 17th of *December* next. The straw may be taken off the premises, and barns will be allotted for threshing the different crops.

*The keep of all the fields, until Old Michaelmas-day, will be sold with the crops, except George's-field."*

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It was proposed, on the part of the plaintiff, to prove that the auctioneer had announced in the sale-room, before the sale commenced, that the keep of the fields had been sold by private contract, and would not be sold with the crops. The defendant's counsel objected that such evidence was inadmissible, as varying a written document by parol; and the learned Baron rejected it. Evidence was also offered, that the defendant was present when the auctioneer made this statement, and that he must have heard it.

Lot 6 was knocked down to the plaintiff for 7*l.* 15*s.* an acre, and the auctioneer made an entry in the book from which he was selling, at the bottom of the description of Lot 6. The description, with the minute, was as follows:—"Lot 6, Ten acres of spring wheat on further hill—Mr. *Shelton*, 7*l.* 15*s.*"

After the sale, the plaintiff and defendant went together into a private room, and, on their return to the sale-room, the defendant desired the auctioneer to put him down as the purchaser of Lot 6, and to make out the account to him. The auctioneer accordingly, in the presence of the plaintiff and defendant, wrote "Mr. *L.*" in the minute, which then stood as follows:—"Lot 6, Ten acres of spring wheat on further hill—Mr. *Shelton*, (Mr. *L.*), 7*l.* 15*s.*"

The wheat in question was not spring wheat, but red *Lammas* wheat, which, though sown in the spring, is liable to several injuries from blight and mildew, to which spring wheat is not so much exposed. The defendant had offered to sell the crop to a third person, and had paid the plaintiff 3*l.* 5*s.* deposit, but the crop being afterwards damaged by mildew, he refused to complete his bargain.

On this evidence the learned Baron nonsuited the plaintiff, but gave him leave to move to enter a verdict.

A rule having been obtained accordingly—

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*B. Andrews* and *Gunning* were heard against the rule,  
and—

*Storks*, Serjt., and *Kelly*, in support of it.

*Cur. adv. vult.*

BAYLEY, B.—This case stood over on a point which was ingeniously raised on the distinction between the case as between *Livius* and *Shelton*, and that between *Shelton* and *Haseldine*, the original seller; and it was said, that parol evidence of what passed at the time of the sale might be given, as between the present plaintiff and defendant, on the count for goods bargained and sold, as evidence that the contract was for something different from what was the subject matter of the sale mentioned in the first count on the special agreement; and, though the evidence was rightly rejected when it was offered on the special count to explain the written contract, and was never distinctly offered on the count for goods bargained and sold; yet, if the justice of the case required it, and if there were any fair probability that the result of another trial would be different, we should have thought it right that the cause should go down again for a further inquiry; but, upon consideration, we are satisfied that there is a decisive objection to the plaintiff's recovering, and that the result would be the same on another trial.

This was an action for the price of growing crops. The declaration contained two counts on a special agreement, and a count for goods bargained and sold. The first special count stated, that a Mrs. *Haseldine* had exposed the crops in question to sale by auction, and that *Shelton*, the plaintiff, had become the purchaser of lot 6, and had afterwards sold the same to the defendant. It appeared on the trial, that the auctioneer was selling at the auction by a printed paper. In that paper, lot 6 was described

as "ten acres of spring wheat (more or less), an excellent crop on the further hill;" and Lot 15, "the keep of *George's* field until *Old Michaelmas-day* next."

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There was also a printed memorandum at the bottom of the printed paper, stating that the keep of all the fields until *Old Michaelmas-day* next will be sold with the crops, except *George's* field.

At the trial, the plaintiff endeavoured to prove a valid sale from Mrs. *Haseldine* to himself; and it appears that parol evidence was offered, for the purpose of proving that it was explained by the auctioneer at the time of the sale, that the wheat in question was not spring wheat, and that the keep of the field, with respect to this lot, was not to be sold; and therefore that the purchaser of lot 6 would not be entitled to the keep of the field, where that part of the crop was growing. It was objected, on behalf of the defendant, that this parol evidence was inadmissible, and that it was necessary to have a written agreement, whether it was a sale of an interest of lands under the 4th section of the Statute of Frauds, or a sale of goods and chattels under the 17th section; that a written contract was not necessary if there was a part payment, but otherwise a signature was necessary, whether the case fell under the 4th or 17th sections of the Statute of Frauds.

Lot 6 was knocked down to Mr. *Shelton*, and the auctioneer put down his name as the purchaser; and whether this were to be considered as a sale of an interest in land, or of goods and chattels, the signature of the auctioneer was binding as the agent of both the parties, and the written contract so signed became binding. We must look, then, at the contents of that instrument so signed, for the terms of the contract between the parties: on the face of that contract we must say that spring wheat was sold, and that the keep was included. The defendants objected, and rightly, to the admission of parol evidence to vary this contract.

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*Gunnis v. Erhart (a), Powell v. Edmunds (b), and many other cases collected in Mr. Phillipps's book on Evidence (c), shew the principle to be, that a written instrument signed, as it is in this case, with the purchaser's name, is the instrument at which you are to look, to see what is the contract between the parties. In the present case, a written instrument was signed by the auctioneer, at the time of the sale. That instrument specified ten acres of spring wheat and the keep of the field; you were not therefore at liberty to give parol evidence that the buyer was not entitled to have spring wheat, or the keep of the field.*

It is a useful and proper general rule, that an auctioneer, by parol explanation at the time of the sale, shall not be suffered to vary from the terms of the printed particulars. This rule is attended with no hardship, because it would be easy to obviate any difficulty in case the article sold be different from the description. It would have been an easy proceeding in this case, to make the condition or description in the printed particulars correspond with the verbal declaration of the auctioneer. Had he struck out the word "spring" before "wheat," from the description of the lot, and in the written memorandum inserted the words "except also the keep of lot 6," there could have been no difficulty, and the buyer of the lot would then have been bound by the express terms of the written contract.

A distinction has been taken between the case of *Shelton* as buyer, and *Livius* as buyer; because it has been said, that although *Shelton* might be bound only by the written contract as buying at the sale, *Livius* was not. No distinction, as it appears to me, can be made in this respect; for the facts shew that which would be an objection when *Shelton* was the buyer, to be also an objection when *Livius* was the buyer.

(a) 1 H. Bl. 289.      (b) 12 East, 6.      (c) 1 Phil. Ev. 541.

After *Shelton* had become the purchaser, he retired into another room with *Livius*; what passed there did not distinctly appear; but on their return there was a notification that *Livius* had become the buyer. *Livius*, in the presence of *Shelton*, desired that his name should be introduced and substituted for that of *Shelton*; and thereby the auctioneer became the agent of *Livius*; the name of *Livius* was introduced in the place of that of *Shelton*, and *Livius* then became the buyer. We must look then to that instrument, signed by the accredited agent of both parties, to see what *Livius* agreed to buy from the plaintiff; and we find from that instrument, that it was exactly what *Shelton* had agreed to buy from Mrs. *Haseldine*; that was spring wheat, and the keep was included. It seems to me, therefore, that, if we were to send this cause down again for a fresh trial, parol evidence to vary the agreement between *Shelton* and *Livius* would be equally inadmissible, as if offered to vary the agreement between *Shelton* and Mrs. *Haseldine*; because it would equally be an attempt to vary a written contract signed by the accredited agent of both parties. I am therefore of opinion that there should be no new trial, and that this nonsuit should stand.

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v.  
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VAUGHAN and BOLLAND, Barons, concurred; and the rule was—

Discharged.

*Exch. of Pleas,*  
1832.

RING, Administratrix of JOHN RING, deceased, v.  
ROXBROUGH.

A count in *indebitatus assumpsit* stated the promise to pay several sums of money, in consideration of being indebted in those sums for the several matters which were respectively stated in the count:—*Held*, that it was no objection to the whole count, on special demurrer, that one of the matters stated was insufficient and bad as a consideration for that part of the promise which related to it.

*Held* also, that the count was not bad as to the several matters stated in it, and that the count was not bad as to the promise, on the ground that the time of the debt being made to the plaintiff was stated in his promise, and of his making the promise, on the 2nd day of January, 1832, and stated the time of the grant of letters of administration to the plaintiff, on the

11th of January, 1831:—*Held*, on special demurrer, that the allegations were inconsistent, and the count bad; and that one of the allegations of time could not be rejected as surplusage, as then a material and traversable fact would be laid without a time.

It is no objection, on general demurrer, to a count in *assumpsit*, that the promise is stated under a *whereas*.

—*Held*, that it would be no objection on special demurrer.

**DECLARATION** stated, that whereas the defendant heretofore, in the lifetime of the said *John*, to wit, on the 2nd day of January, 1832, in the county of *Middlesex*, was indebted to the said *John* in 20*l.*, for the work and labour, care and attendance of the said *John*, by the said *John*, in his lifetime, done and bestowed as a surgeon and apothecary, at the request of the defendant, in and about the healing and curing, and endeavouring to heal and cure, divers persons of divers diseases, sicknesses, and maladies, under which they then respectively laboured and languished; and also for divers *diseases* and other necessary things provided, administered, delivered, and applied on those occasions for the defendant, and at his request; and in 20*l.* for the price and value of other work then and there done, and materials for the same provided by the said *John* for the defendant, at his request; and in 20*l.* for money then and there lent by the said *John* to the defendant, at his request; and in 20*l.* for money then and there paid by the said *John*, for the use of the defendant, at his request; and in 20*l.* for money then and there received by the defendant for the use of the said *John*; and in 20*l.* for money found to be due from the defendant to the said *John*, on an account then and there stated between them. And whereas the defendant afterwards, and in the lifetime of the said *John*, to wit, on the same day and year aforesaid, in the county aforesaid, in consideration of the premises, then and there promised to pay the said several monies respectively to the said *John*

on request, yet he hath disregarded his promise, and hath not paid any of the said monies, or any part thereof, to the said *John*, in his lifetime, or, since his death, to the said plaintiff, to whom, *after the death of the said John, to wit, on the 11th day of January, in the year of our Lord, 1831*, in the county aforesaid, administration of all and singular the goods and chattels and credits which were of the said *John*, deceased, at the time of his death, who died intestate,) by *William*, by Divine Providence, Archbishop of Canterbury, Primate of all *England*, and Metropolitan, in due form of law was granted; to the damage of the said plaintiff, as administratrix as aforesaid, of 20*l.*; and therefore she prays relief, &c. And the said plaintiff brings into Court here the letters of administration of the said Archbishop, which give sufficient evidence to the said Court here of the grant of administration to the said plaintiff as aforesaid; the date whereof is a certain day and year therein in that behalf mentioned, *to wit, the day and year last aforesaid.*

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1832.

RING  
v.  
ROXBROUGH.

Demurrer and joinder.

*Archbold*, in support of the demurrer.—There are *three* objections: *first*, the consideration for the promise is insufficient; *secondly*, the date of the letters of administration is stated to have been in the lifetime of the deceased; and *thirdly*, the promise, which is the gist of the action, is stated only by way of recital under a *whereas*.

The *first* objection is, that the defendant is stated to to have been indebted for divers diseases. That surely is no good ground for a promise; and as one part is bad, the promise which is entire cannot be supported.

[*Bayley, B.*—There are other good considerations to support the count. The promise is one entire promise on some good considerations. If the count is good as to any one of these considerations, the promise will be supported. There are many authorities to this effect: that though, where in a declaration there is one bad count, you may

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1832.

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RING  
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arrest the judgment if general damages are given; yet if part of a particular count be good, and give a cause of action, you cannot arrest the judgment on the ground of part of the count being bad, though general damages be given on the count.]

Then, *secondly*, it is stated that the defendant was indebted in the lifetime of the deceased, on the 2nd of *January*, 1832, and the letters of administration are stated to have been granted on the 11th of *January*, 1831; that is absurd and impossible, and neither of these dates can be rejected as surplusage; for, if the date in either case be rejected, there would be no date to a material allegation. If the first date be rejected, there will be no time laid when the defendant was indebted; and, if the second date be rejected, there will be no time laid to the allegation of the grant of the letters of administration. It is clearly matter of special demurrer, if a material fact be alleged without an allegation of time.

*Thirdly*.—The last objection arises on the new form of the *indebitatus* counts (a). The cause of action must be stated positively, and not by way of introductory allegation. In *assumpsit*, the use of the *quod cum* is allowed in stating the consideration; but there has always been a positive allegation of the promise; and it is bad to say, *whereas* the party promised, which is mere recital.

[*Bayley, B.*—There is no special cause of demurrer on this ground; it cannot be matter of substance. But, in the common form of a declaration on a bond, all the contract is stated under a *whereas*. Lord *Lyndhurst, C. B.*—It states shortly, *whereas* the defendant became bound, yet he did not pay.]

*Tomlinson, contra*, was desired by the Court to confine himself to the objection as to the inconsistent dates.

A repugnant date may be rejected as surplusage. In *Buxton v. Nancolas* (b), the count stated that “he the

(a) Trin. T. 1 Will. 4.

(b) 11 B. Moore, 552.

said *Benjamin*," by mistake using the name of the plaintiff's testator, instead of the defendant's, "in the lifetime of the said *Benjamin*, promised the said *Benjamin*." The Court of *Common Pleas* held that the words, "the said *Benjamin*," might be rejected as surplusage.

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[Lord *Lyndhurst*, C. B.—There you might leave out the words, "the said *Benjamin*," without prejudicing the sense. Insensible words may be struck out.]

Supposing the last date struck out as insensible, the allegation of the grant of the letters of administration might be supported without a time. The letters are brought into Court by the proferet; they are voidable, but, till avoided, credence must be given to them.

[*Bayley*, B.—Is not the grant of the letters of administration a traversable fact? If you reject the latter date, that allegation stands without a day. Is it not the rule, that you must lay a day for every material and traversable fact? In *Denison v. Richards* (a), the plaintiffs declared on a covenant to indemnify them against loss to arise on a covenant by which they had agreed to indemnify the Bank of *England* against an advance of 100,000*l.* to *L.* and *B.* upon bills of exchange, to be drawn, &c.; and it was alleged that the Bank, to wit, *on the 28th of August*, 1810, advanced to *L.* and *B.* 100,000*l.*, &c.; and that *L.* and *B.* drew certain bills of exchange to the amount of 100,000*l.*, which bills were accepted; and that *L.* and *B.* became unable to pay; by reason of which premises the plaintiffs became damnified, and forced and obliged to pay, and did *then* and there necessarily pay: and the Court held that the time was insufficiently laid, for the word *then* must have referred to the 28th of *August*, the day of the advance by the Bank, and the bills could not then have become due; and therefore the allegation, that the plaintiffs were forced to pay the Bank on the same day, was senseless and bad on

(a) 14 East, 291.

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1832.

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special demurrer; and the word could not be rejected as surplusage, because then there would have been no allegation of the time when they were forced to pay. That case appears to me strongly in point on the present occasion.]

In *Bynner v. Russel* (a), a count on a bill of exchange averred, that, afterwards, and when the bill according to the tenor and effect thereof became due, to wit, on the 31st day of *March*, 1822, it was presented for payment. There was a special demurrer, assigning for causes, that the 31st of *March* in that year fell on a *Sunday*; but the Court held the day immaterial. The Court, in that case must have rejected the day as surplusage, and then there was no day to the averment of the presentment.

[*Bayley*, B.—There was no inconsistency there. On the face of the declaration the time was rightly alleged. Lord *Lyndhurst*, C. B.—The Court there held, that, even on special demurrer, the day, being under a *videlicet*, was immaterial.]

*Archbold*, in reply.—In *Bynner v. Russel*, there was no inconsistency in the averment of time. It appeared that the day mentioned was *Sunday*; but the plaintiff was not bound to that day on the trial, and it was perfectly immaterial. *Buxton v. Nancolas* merely shews that the insensible words, “the said *Benjamin*,” might be rejected, there being words sufficient without them: here, a day was necessary, because the fact is traversable.

LORD LYNTHURST, C. B.—This objection arises upon special demurrer; the averment is material, and therefore a time must be annexed. The allegation of the day when the letters of administration were granted, is inconsistent with the time when the testator is alleged to have been alive. We must, therefore, consider it as laid without a

(a) 1 Bing. 23; 7 Moore, 267.

day, and, if no day be laid to a material allegation, the declaration is bad on special demurrer.

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BAYLEY, B.—I take the general rule to be, that, as to all traversable facts, there must be time and place, though the want of them may, under certain circumstances, be cured by the statutes of jeofails. In the present case there are three traversable facts: the being indebted, the promise, and the grant of the letters of administration. Now, the time when the defendant was indebted to the intestate, and when he promised to pay him, which facts constitute the cause of action, is laid in 1832; and the grant of the letters of administration is laid in 1831. You must, therefore, as to one at least of these three material facts, reject the allegation of time. Now, in *Bynner v. Russel*, there was still an allegation of time, though the date was rejected; for the allegation there was, that, when the bill became due and payable, it was presented for payment: that must be on the 30th *March*. In that case, therefore, there was an allegation of time, which distinguishes it from the present case.

VAUGHAN, B.—The title and right to sue of the present plaintiff depended upon the letters of administration. The grant of them, therefore, was a material fact, in alleging which it is necessary to lay a time.

BOLLAND, B.—With reference to material allegations, I have always understood that a time and place were necessary. Here, to make the declaration sensible, you must reject the time laid to some material fact.

Judgment for the defendant.

*Exch. of Pleas,*  
1832.

ALEXANDER v. MILTON.

It is sufficient, in an affidavit to hold to bail, that the deponent describes himself as clerk to *A. B.* and *C. D.*, attorneys of (the place of business of the attorneys).

**ON** motion by *Curwood* to deliver up the bail-bond to be cancelled, on the ground that, in the affidavit to hold to bail, the residence of the person making the affidavit was not described according to the rule (a), by which it is ordered, that the affidavit shall contain "the true place of abode;" it appeared that the deponent was described as clerk to *A. B.* and *C. D.*, of &c. (setting out their place of business).

*Curwood* contended, that the office of the masters of the deponent was not his place of residence.

But, *per* BAYLEY, B. (b), if by residence is meant the place where he sleeps, he would probably not be found there in the day time. This affidavit contains a true addition, and a true place of abode, within the meaning of the rule. It states the place where the deponent may generally be found from morning to night.

Rule refused.

(a) M. T. 15 Car. 2.

(b) The single Judge.

Exch. of Pleas,  
1832.

THICKNESSE and Another v. BROMILOW.

**ASSUMPSIT** on three bills of exchange against the defendant as indorser. The first count stated that certain persons, using the name, style, and firm of *Thomas Spencer & Co.*, on the 1st of *August*, 1831, made their bill of exchange in writing, and directed the same to Messrs. *Barclay*, Bankers, *London*, and thereby required the said Messrs. *Barclay & Co.*, three months after date, to pay to the executors of the late *M. Hughes*, Esq., *Shordly Hall*, or order, the sum of 58*l.* 10*s.* for value received in clay. That one *E. J. Pemberton* was the executor of the late *M. Hughes*, and, being such executor, indorsed the bill to the defendant, who indorsed it to the plaintiffs; averment of presentment for payment, &c.; and breach. The second count stated, that certain persons using the name &c., made their certain other bill of exchange in writing, directed to Messrs. *Barclay & Co.*, and thereby required the said Messrs. *Barclay & Co.* to pay the bearer the sum of &c.; that the defendant, being the bearer, indorsed the bill to the plaintiffs, &c. Third count—That the defendant, on &c., in and by the name of *Thomas Spencer & Co.*, made his certain other bill of exchange, in writing, and directed the same to Messrs. *Barclay & Co.*, Bankers, *London*, and thereby required the said Messrs. *Barclay*, three months after date, to pay the bearer the sum of 58*l.* 10*s.* &c.; that the defendant, being the bearer, indorsed the bill to the plaintiffs, &c., he, the defendant, then and there well knowing that no such person as the said *Thomas Spencer & Co.* in the bill mentioned then existed, but that the same name was merely fictitious. The fourth count was similar to the third, except in making the bill payable to the plaintiffs; averment of the bill being fictitious, as in the third count. Fifth count—That the defendant made his certain other bill of

Where one of two partners, having authority to bind the other by drawing or indorsing bills of exchange, raised money by bills in fictitious names, indorsed by him in the partnership firm, and the money was afterwards applied to the partnership purposes:—*Held*, that the other partner was liable to the persons from whom the money was so obtained.

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1832.

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exchange in writing, and directed the same to Messrs. *Barclay & Co.*, Bankers, *London*, and thereby required the said Messrs. *Barclay & Co.*, three months after date, to pay to the plaintiffs the sum of &c.

There were similar counts on the other two bills, with the money counts. Plea—*Non assumpsit*.

At the trial before *Vaughan*, B., at the *London* Sitings in *Hilary* Term, it appeared that the bills in question were in the following forms:—

“ £58 10s. *Prescot Pottery, August 1, 1831.*

Three months after date, pay the executors of the late *Michael Hughes*, Esq., *Shordly Hall*, the sum of fifty-eight pounds, ten shillings, for value received in clay.

*Thomas Spencer & Co.*

At Messrs. *Barclay & Co.*, Bankers, *London*.”

(Indorsed)

“ *Edward James Pemberton*, Executor of the late *Michael Hughes*, Esq.

*Ashall & Bromilow*.”

“ £25 *Nalshaw Moor, near Bolton, Aug. 3, 1831.*

Three months after date, pay Messrs. *Ashall & Bromilow*, slate merchants, the sum of forty-five pounds, for value received in slate.

*Robert Lord & Co.*

At Messrs. *Barclay & Co.*, Bankers, *London*.”

(Indorsed) “ *Ashall & Bromilow*.”

“ £56 8s. *Gerard's Bridge Pottery, 12th Aug. 1831.*

Three months after date, pay Messrs. *Clare & Haddock*, Esqs., coal proprietors, the sum of fifty-six pounds, eight shillings, for value received in coal.

*Thomas Lightfoot & Co.*

At Messrs. *Barclay & Co.*, Bankers, *London*.”

(Indorsed)

“ Per pro. *Clare & Haddock, William Critchley.*

*Ashall & Bromilow*.”

The plaintiffs were bankers at *Wigan*, in *Lancashire*. The three bills in the declaration mentioned were brought to the bank by one of the sons of *Charles Ashall*, on the 11th, 18th, and 19th August, respectively. They were discounted in the ordinary course of business, on the credit of *Ashall & Bromilow*, and in the belief that they were partners. The same person had brought several bills to the bank to be discounted previously, which were indorsed similarly, in the names of *Ashall & Bromilow*, and all of which had been duly taken up when due. The indorsements were the writing of *Ashall*.

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The defendant and *Ashall* had, for upwards of ten years, carried on a slate and stone quarry, at a place called *Moss Bank*, about eight miles from *Wigan*, the entire management of which was intrusted to *Ashall*, *Bromilow* having seldom been seen near it. The defendant kept a public house, and was the under-looker of a neighbouring colliery, and for upwards of five years last past had resided three miles from the quarry. *Ashall's* son proved that he was directed by his father to go to the *Wigan* Bank, and that he always gave the money he received to his father, that he had seen him pay the workmen's wages with it, and that he had no reason to suppose but that all of it had been laid out on the business of the quarry. The concern was in the habit of giving credit for stone, &c., and used bills of parcels with printed heads, in the following form:—

“ Bought of *Ashall & Bromilow*, *Moss Bank*,  
Stone, Flag, and Slate Dealers.”

The quarry was a very extensive one; there was a steam engine, some machinery, and upwards of twenty workmen. Mr. *Part*, the plaintiffs' attorney, proved that the plaintiffs, having discounted several other bills, more recent than those now sued on, had reason to suppose that the

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1832.

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names on them were forged; and therefore he went over to the quarry on the 20th of *October*. On his way, he called at the defendant's house, who went with him; and, as they proceeded, something was said as to the liability of the defendant for the bills drawn and indorsed by *Ashall*: and the defendant asked how far he should be liable for *Ashall's* conduct? to which Mr. *Part* answered, that he would be liable as partner for the amount for which the bills had been drawn; the defendant said, it would be a very hard case, for he was not carrying on the business on his own account, but only as trustee. Mr. *Part* told him, he had made himself responsible by permitting his name to be used; the defendant said, he had disliked that for some time, and wished to have had it altered. Mr. *Part* told him that would have made no difference, because, if he chose to carry on trade as trustee, as between the public and himself he would be equally liable. They soon afterwards separated in search of *Ashall*, but met again at *Ashall's* house about midnight of the same day, when they found the books of account and other papers belonging to the quarry, most of which the defendant took away with him. About a week afterwards, the defendant read to Mr. *Part* an extract from a letter in his possession, which he said had been received by *Ashall's* wife since his committal to *Lancaster* Castle, and said, that Mrs. *Ashall* had received a letter from her husband, requesting the defendant to raise money to take up the bills; and he made no observation upon it. Mr. *Part* further proved, that he had reason to believe that the prior signatures on the bills were not genuine. The names were those of respectable persons, but none of them had made any payments; nor were the plaintiffs going to take any proceedings against any of them. Since *Ashall's* committal the defendant carried on the quarry alone, and gave notice to all the debtors to pay himself only. Proof of

presentment for payment, and of notice of dishonour, was given. *Exch. of Pleas,*  
1832.

It was contended at the trial, that the defendant was not partner with *Ashall*: that, however, was ultimately admitted; but it was urged that the evidence went only to prove, that the defendant and *Ashall* carried on a slate quarry together, and did not prove a general partnership; and that such connection was not sufficient to give an implied authority to draw bills; and that it was necessary to give proof of the defendant's having recognised *Ashall's* drawing bills, on the authority of *Dickenson v. Valpy* (a). The learned Baron thought that there was sufficient evidence of such recognition to go to the Jury. It was also objected, that none of the bills being payable to order, each indorsement required a new stamp, as being an entirely new bill; and that, since none of the indorsers indorsed to order, the bills could not be transferable to the plaintiffs. The learned Baron left two questions to the Jury—*First*, whether the defendant and *Ashall* were partners; *secondly*, whether, from the acts and declarations of the defendant, they were satisfied that he had given either an express or implied authority to *Ashall* to draw bills, and had from time to time recognised such authority.

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The Jury found for the plaintiffs, saying they were quite satisfied as to the partnership, and the implied authority given by the defendant; and that he must have known of what *Ashall* had been doing. The verdict was taken for the amount of the principal only.

In *Hilary* Term, *Wightman* obtained a rule *nisi* for a nonsuit, or a new trial, on the ground of misdirection, and the verdict being against evidence.

(a) 10 Barn. & Cress. 128; 5 Man. & Ry. 126.

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The Court now called upon—

*Wightman* and *Tomlinson* to support the rule.—There was no sufficient evidence of recognition by the defendant of *Ashall's* drawing bills. *Part* supposed that the fact of the defendant and *Ashall* being partners was sufficient to raise the liability of the defendant; and his conversation with the defendant proceeded on that supposition. The bills of parcels were made out in the name of *Ashall & Bromilow*; and when *Part* spoke of the use of his name, he meant as a partner (*i. e.*) in the head of the bills of parcels. *Part* said he would be liable as partner.

[*Bayley*, B.—The defendant did not put that point at the trial, and the money raised by the bills was applied to the use of the partnership. Suppose one of two partners, it being necessary for the trade, borrows money and applies it to the trade, is the lender to act at his peril when he lends?]

There was no proof of necessity.

[Lord *Lyndhurst*, C. B.—Is it not a *prima facie* case?

*Bayley*, B.—The money was borrowed for partnership purposes, and applied to them. Has not a partner a right to borrow money for the partnership?]

A mining partnership does not confer on one partner a right to raise money by bills or loans. *Dickenson v. Valpy* (a).

[*Bayley*, B.—That was not a common partnership. It was the case of a mining company, in which there were directors and shareholders; the question was, whether a bill not drawn by one partner on another, but by an agent on the company, would bind shareholders and directors. The Court took a distinction between ordinary partnerships and mining companies. There were directors in the

(a) 10 Barn. & Cress. 128; 5 Man. & Ry. 126.

company by whom alone money ought to have been raised. Lord *Lyndhurst*, C. B.—This was an extensive concern, the business was carried on as a trading firm under the name of *Ashall & Bromilow*, and bills of parcels were made out in the same way.]

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According to the judgment of Mr. Justice *Littledale*, in *Dickenson v. Valpy*, some evidence of the nature of the company should be given to shew that it was necessary that bills of exchange should be drawn for the purposes of the concern.

The want of a stamp is fatal, and equally so whether the prior indorsements be forged or genuine, because indorsing is the making of an entirely new bill.

[*Bayley*, B.—If the prior indorsements are forgeries, there was no bill before the indorsement by *Ashall*, and only one stamp can be necessary.]

The forgery is also fatal; a plaintiff can never recover in respect of a transaction which amounts to a felony, until it has been made the matter of judicial investigation; and the case is the same when the plaintiff endeavours to recover against one who is jointly liable with the felon. Lord *Tenterden's* judgment in *Stone v. Marsh (a)*, is applicable to this point.

[Lord *Lyndhurst*, C. B.—In the transaction between these parties there is no felony proved. *Bayley*, B.—There is not the least evidence to shew that *Ashall* had committed a forgery. The bills may be not genuine, and yet have been put into *Ashall's* hands, he not knowing of the forgery. If the case fail on the bill, cannot the plaintiff recur to the consideration? If a partner borrow money in the partnership name, is the lender to prove that the money is applied to partnership purposes?]

This is not the case of a loan, but a discount; and if it

(a) 6 Barn. & Cress. 564; 8 Dowl. & Ry. 71.

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be a case of discount once, it continues so throughout, notwithstanding the use to which the money may be applied.

“A discounter makes a purchase of the bill,” *per Bayley, J.*, in *Emly v. Lye* (a).

[*Bayley, B.*—A discounter of a bill cannot treat it as a loan, so far as to call on one whose name is not on the bill, but is confined to those whose names are on it.]

The Court having desired to hear the counsel for the plaintiffs, the case stood over until this term.

*Follett and Cowling*, for the plaintiffs.—The defendant, in his conversation, must have meant bills of exchange. The conversation turned on those only, and bills of parcels were never mentioned until afterwards, when *Part* and the defendant met at *Ashall's* house. If *Ashall* had no power to draw bills in the partnership name, and had only forged the defendant's name, he would never have written to the defendant to request him to take up the bills. The jury were well warranted in their verdict; the defendant lived for several years in the neighbourhood of the mine; and, since the circulation of the country is usually by bills, it is to be presumed that the defendant and *Ashall* meant to carry on their business in the same way. As to the stamps, it is immaterial whether the bills are good or not, as the plaintiffs are entitled to recover for the consideration, as there was an immediate privity between the plaintiffs and defendant. Every indorsement is a new drawing, in ordinary cases, as to all subsequent holders (b); whereas, here, it is only so as to the immediate parties; and the common case is, therefore, stronger than the present, as to the necessity of a new stamp; besides, in order to require a new stamp, the bill must not only be a new one as to certain purposes or persons, but for all.

(a) 15 East, 7.

(b) 1 Salk. 132.

[*Bayley, B.*—On this point the forgery seems in favour of the plaintiffs.]

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The *King's Bench* decided in the recent case of *Ducarrey v. Gill*, that the discounter of a bill might recover for the consideration without regard to the bill itself. The rule as to forgery only applies where the forgery was the foundation of the action, and here it was not. The indorsement of *Ashall & Bromilow* was the foundation here, and the other indorsements were prior to it; the proof of them made no part of the plaintiffs' case. In *Tatlock v. Harris (a)*, the defendant had accepted a bill, where the names of the payee and first indorser were forgeries, and with knowledge of that fact. Proof of the signature of the payee, or of its being a forgery, was there essential to the plaintiff, it made part of his case, and the forgery was, therefore, more the foundation of the action in that case than in the present, and yet the plaintiff was held entitled to recover for the consideration. That case, and the others about the same time, which arose out of the bankruptcy of *Gibson & Co.*, shew that when money has been received, it may be followed and recovered in whose hands soever it be, notwithstanding there may have been a forgery in the case. Now, here, the plaintiffs relied on the common counts, and took a verdict for the principal only, without interest. If it were necessary, it might be contended that the partnership of the defendant with *Ashall* would alone confer upon the latter an authority to draw bills, or that at all events the business was sufficiently a trade for the purpose. In *Harrison v. Jackson (b)*, Lord *Kenyon* says generally, that, "in mercantile transactions in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest."

They were then stopped by the Court.

(a) 3 Term Rep. 174.

(b) 7 Term Rep. 210.

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LORD LYNTHURST, C. B.—I am of opinion that there ought to be no new trial. The first question was, whether there had been an authority given by the defendant to indorse these bills. I think the jury have drawn the right conclusion from Mr. *Part's* evidence, and that all the facts of the case are consistent with that conclusion, and would be inconsistent with any other; when the defendant said he had disliked that, and wished to have had it altered, he must have meant the bills of exchange. The conversation related to bills and to bills only. It is impossible to reconcile *Ashall's* conduct, in writing to *Bromilow* to request him to take up the bills, in any other way than by supposing that the defendant knew of his drawing bills. It is impossible, consistently with such conduct, to suppose that there was no authority.

As to the stamps, it is unnecessary to consider them. *Ashall's* son went to the bank and received the money on the partnership account, and *Ashall* applied it to the business. As to the forgery, there is no evidence of it; and, therefore, I think that there is no ground for a new trial on any of the three points.

BAYLEY, B.—I am of the same opinion. The business was carried on by *Ashall & Bromilow*; they were trustees, but still they might carry it on so as to make each other liable for the amount of money applied to the business, and one might give another authority to raise money. Here, *Ashall* was in the habit of indorsing bills in the names of *Ashall & Bromilow*; *Bromilow* suffers this and enables him to hold them out to the world as liable on the bills. Mr. *Part's* evidence shews that he must have been aware of it. The money was applied to the trade; there is positive evidence of that; and, therefore, I think that, independent of the questions of stamps and forgery, the defendant is liable.

VAUGHAN, B., concurred.

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BOLLAND, B.—Though I have not heard the whole of the argument, yet I have heard sufficient to day to satisfy me that the verdict is right. *Part's* evidence is conclusive that the defendant was cognizant of *Ashall's* drawing bills. I do not, however, go the length of deciding, nor is it necessary to do so, that all merchant-partners have an implied authority to bind each other by bills of exchange in all cases. I do not go the length that has been contended for, that if two men carry on business together there is an implied authority to draw bills. But here, the defendants were proved to have received the money.

Rule discharged.

#### FARMER v. STANFORD.

ON motion by *Busby* to order the sale of issues returned by the sheriff on a *distringas*, which had been sued out by the plaintiff under the old common law practice, on a service of a *venire facias*, at the dwelling-house of the defendant. The Court refused the application, saying that they were not satisfied that the statutes (*a*) did not apply to a *distringas* upon a *venire*; and that they would not, by ordering the sale of the issues, sanction the course taken by the plaintiff in issuing the process himself, without having recourse to the plain course pointed out by the statute 7 & 8 Geo. 4.

Where a plaintiff, without an order of the Court, sued out a *distringas* on a *venire* served at the dwelling-house of the defendant, the Court refused a rule for sale of the issues returned by the sheriff.

Rule refused (*b*).

(*a*) 51 Geo. 3, c. 124, s. 2, and 7 & 8 Geo. 4, c. 71, s. 5.

C. & J. 548, and *Watson v. Locke*, 2 C. & J. 203.

(*b*) See *Pennel v. Kingston*, 1

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Property in this country belonging to a foreigner, who dies abroad, and appoints an *English* executor, and bequeaths to *English* legatees, is not liable to legacy duty.

A testator, born in *America*, A.D. 1764, went to *Scotland* when a minor for the purposes of education, and, after he had attained his majority in 1788, sailed for *India*, describing himself in the ship's books as an *American*; he remained in *India* thirty years, when he returned to *Europe*, leaving the bulk of his property in *Bengal*; and afterwards, having been in *America*, visited *England*, *Scotland*, and the *Continent*, when he returned to *America*, entered into agricultural pursuits there, and continued to draw his property to that country until his death at *New York* in 1826:—*Held*, that he was an *American* citizen.

THE common rule having been obtained by *Amos*, under the statute 48 *Geo.* 3, c. 99, s. 2, calling upon the executors of *C. K. Bruce* to account and pay the legacy duty, cause was shewn upon an affidavit, which disclosed the following facts:—

“ By a decree made on the hearing of a cause depending in the High Court of *Chancery* in *England*, bearing date the 7th day of *July*, 1827, it was, amongst other things, ordered that it should be referred to the Master in rotation, to take an account of the personal estate of *Bruce* not specifically bequeathed, possessed by the defendants *Bailderson*, *Mackillop*, and *Shoolbred*, his executors; and it was ordered that the said defendants, the executors, should be at liberty to propose any person or persons respectively resident in the *East Indies* and in *North America*, to take out administration with the will annexed to said testator's effects in those countries respectively; and it was ordered that the said defendants, the executors, should be at liberty to appoint such person or persons as the Master should approve, to prove the said testator's will, or to obtain letters of administration of the effects of the said testator in *America* and the *East Indies* respectively, and to collect and get in the outstanding personal estate of the said testator in the *East Indies* and *North America* respectively; and such person and persons was and were to be answerable for what he or they should receive in respect thereof; and to pay the same to the said defendants the executors as the same should be received; and the said defendants were to pass their accounts before the said Master, and to pay the balances that should be from time to time reported due from them into the Bank, with the privity of the Accountant-General, to be placed to the credit of the cause, subject to the further order of the Court. On the hearing of the cause for further directions on the Master's general report, on the

4th day of *February*, 1831, it was, amongst other things, ordered that the Bank Annuities therein mentioned, standing in the name of the Accountant-General in trust in the cause, should be sold, and that the monies to be produced by such sale should be apportioned and paid amongst the several legatees mentioned in the second schedule to the Master's report, whose legacies had not been paid according and in proportion to the amount by said report reported due to them respectively. The funds directed by said last-mentioned order to be sold, had been sold, and the same produced the sum of 33,975*l.* 2*s.* 2*d.*, which had been apportioned amongst the legatees, pursuant to the said order, but the Accountant-General declined to pay the apportioned sums to the legatees without the production of stamped legacy duty receipts, or a certificate from the comptroller of the legacy duties, that no duty was claimed on the legacies in respect whereof the sums apportioned were payable. The father of the testator *Bruce* was born in *Scotland*, and went in his youth to *North America*, where he fixed his permanent residence, and married an *American* woman. The testator *Bruce* was the issue of that marriage, and was born in the state of *Maryland*, in *America*, in or about the year 1764; and the father and mother of the said testator continued to reside in *Maryland* to the time of their respective deaths. The testator was sent to *Scotland* for his education, when a boy, and much under the age of twenty-one years, and was educated there under the care of his paternal grandmother. In or about the year 1788, the testator sailed to the *East Indies*, and was stated in the ship's books to be an *American*, and continued in *India* until in or about the year 1818, during which period he was engaged in mercantile pursuits there on his own account, but had not and did not hold, during his residence in *India*, any place or appointment under his *Britannic Majesty*, or the *East India Company*. In or about the

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year 1818, the testator, having acquired a large property, came to *Europe*, leaving the greater part of his property so acquired in *Bengal*; and, soon after his return to *Europe*, proceeded to the *United States of America*, to see his family and property in that country left him by his father. He came from *America* to this country with the intention of visiting several places in *Scotland* and *England*, and on the Continent of *Europe*, and for the purpose of making arrangements for the removal of part of his property to *America*; and, on his final return to *America*, in or about the year 1824, he commenced drawing his property to the *United States*, and continued doing so till the time of his death, which took place on the 23rd of *December*, 1826, at *New York*, where he resided and had embarked in agricultural pursuits. The testator, in his will, bearing date the 19th day of *December*, 1826, describes himself as *Charles Key Bruce*, late of *Calcutta*, now of *Richmond*, county and state of *New York*; and always considered himself to be an *American*, and not a *British* subject, and was domiciled in *America* at the date of his will and of his death. The testator, by his will, bequeathed legacies to a considerable amount to legatees, some of whom resided and now reside in *Great Britain*, being the legacies in respect of which the said sum of 33,975*l.* 2*s.* 2*d.* had been apportioned as above-mentioned, and including legacies to the executors, and also to persons who resided and now reside in *India* and in *America*; and directed the residue of his estate to be divided among all the said legatees in the same proportions as their original shares, and appointed as his executors persons resident in *England*. The testator, at the time of his decease, had standing in his name, in the *British* funds, 1,111*l.* 4*s.* 2*d.* 3*l.* *per cent.* Consols; 500*l.* 3*l.* 10*s.* *per cent.* Reduced Annuities; and 52*l.* Long Annuities. The will was proved by the executors in the Prerogative Court of the Archbishop of *Canterbury*, and probate duty

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paid to cover effects not exceeding 10,000*l.* in that province. The above-mentioned suit was instituted by certain of the legatees resident in *England* and *Scotland*, for an account and administration of the testator's estate, and the decree before stated was pronounced on the hearing of the cause. Pursuant to the said decree, the Master, by his report, bearing date the 31st of *July*, 1827, certified that he had approved of certain persons to take out administration with the will of the testator annexed; in *India*, and by his said report, bearing date said 31st day of *July*, 1827, also certified that he had approved of certain persons to take administration with the will annexed to the testator's effects in *North America*, and also to prove the testator's will, or to obtain letters of administration of the effects of the testator in *North America*. The only property of the testator, in *Great Britain*, consisted of the said 1,111*l.* 4*s.* 2*d.* 3*l.* *per cent.* Consols; 500*l.* 3*l.* 10*s.* *per cent.* Reduced Annuities; and 52*l.* Long Annuities; standing in his name in the books of the governor and company of the Bank of *England*, and of a sum of 6*l.* 11*s.* 9*d.*, being the balance of an account with Messrs. Sir *William Curtis & Co.*, and of several bills of exchange remitted from *India*, amounting to 6,282*l.* 3*s.* The attornies appointed by the executors in the *East Indies*, under the probate of the testator's will granted there, got in effects to the amount of 30,000*l.*, or thereabouts, which arose from the sale of personal property in that country, and which was remitted to the executors in *England*, and by them paid into the Bank with the privity of the Accountant-General of the Court of *Chancery*, to the credit of the said cause. The testator's property in *America* in lands, *American* stock, and debts owing to him, amounted to the sum of 23,000*l.*, or thereabouts, of which no part had been remitted by the attornies there. The administrators in the *East Indies*, and in *America*, paid the several legacies bequeathed by the testator to persons resident in

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those countries; and the funds possessed by the testator in *England*, and the monies remitted from the *East Indies*, having been transferred and paid to the Accountant-General of the Court of *Chancery*, the same produced the said sum of 33,975*l.* 2*s.* 2*d.* apportioned amongst the several legatees in *England* and *Scotland*, as above-mentioned."

*Jervis* and *Wigram* shewed cause. The liability of the testator's personal estate to legacy duty must depend upon the domicile and character of the testator, and cannot be regulated by considerations incident to the character of the legatees, and the local situation of the property, or by circumstances attaching to the personal representative; for these latter are capricious and uncertain, and afford no definite rule by which the Court can be guided in the construction of the statute. On the other hand, the domicile or character of the testator gives a clear rule by which to ascertain whether each particular case is one in which the legislature intended that the duty should be imposed.

It may even be contended, that the testator was an *American* subject, but it is quite clear that his domicile was in *America*. *Maryland* was the *forum originis* of the testator, it was not only his domicile of origin, but the domicile of his parents, who lived and died there. Upon this subject, Lord *Alvanley*, then Master of the Rolls, says, in the case of *Somerville v. Somerville* (a)—"The third rule I shall extract is, that the original domicile, or, as it is called, the *forum originis*, or the domicile of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile. I speak of the

(a) 5 Ves. 787.

domicile of origin rather than that of birth, for the mere accident of birth at any particular place cannot in any degree affect the domicile. I have found no authority or dictum that gives for the purpose of succession any effect to the place of birth. If the son of an *Englishman* is born upon a journey in foreign parts, his domicile would follow that of his father. The domicile of origin is that arising from a man's birth and connections."

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It is true that the testator in this case was sent to *Scotland* when a boy, for the purpose of education; but, during a state of pupillage, he could acquire no domicile of his own, for no domicile can be acquired till a person is *sui juris* (a). After that period, he remained in *Scotland* or *England* till he was twenty-four years of age, but that circumstance would confer no domicile; for, according to *Brissonius* (b)—“*Non domicilium ibi quis habere intelligitur ubi studiorum causâ habitat, nisi decem annis transactis eo loco sibi sedes constituerit.*” He then sailed for *India*, describing himself in the ship's books as an *American*. And though he remained in *India* for a length of time, he did not thus lose his domicile of origin, which remains until there is an intention manifested of abandoning it and taking another. His subsequent conduct, his return to *America*, his residence in *New York*, where he embarked in agricultural pursuits, and his description of himself in his will, clearly manifest no such intention, and satisfy the civil law definition of domicile—“*Ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus si nil avocet* (c).”

The place of the testator's death is also entitled to consideration, and was much relied upon in *Somerville v. Somerville*; for, though the place of death is nothing,

(a) Per Lord Alvanley in *Somerville v. Somerville*, 5 Ves. 787.      verbo *Domicilium*.  
(c) Cod. lib. 10, tit. 39, l. 7.

(b) De Verborum Significatione,

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without the intention of the party, yet, where there is a previous intention of residence confirmed by the act of the party evidencing that intention, that is to be taken into consideration in fixing the domicile.

It may even be argued, that the testator was a citizen of *America*. Though born when *Maryland* was a colony of this country, and then a natural born subject of *Great Britain*, after the treaty recognising the independence of the *United States*, which was signed in *September*, 1783, he had the power of election; which he exercised in favour of *America* by his description of himself as an *American* in the ship's books, and by his subsequent conduct. *Doe d. Thomas et Uxor v. Acklam* (a). A case in *Denisart* (b) was decided entirely upon the party's description of himself; and the case of the Duchess of *Hainault* (c) turned exclusively upon the same point.

It is true, that the words of the stat. 36 *Geo. 3*, c. 52, s. 2, are very general; but they must receive a reasonable construction: and it is impossible to say, that, in consequence of their generality, they shall extend to every person in every possible case. In *Ewin's* case (d), the Chief Baron says, that the act is confined to *Great Britain*; and Mr. Baron *Bayley*, in the same case, lays it down as quite clear, that the legacy acts are co-extensive with the limits of this kingdom and this kingdom only. If the testator were a citizen of *America*, not bound to contribute to the support of this country, his property could not be within the legacy acts. How then is the liability to be determined? Not by the residence or character of the legatee; for, sect. 32 contains a provision as to the receipt to be taken where the legatee is abroad; and the case of *Logan v. Fairlie* (e), and other cases, determine that a legacy transmitted to this country by an executor

(a) 2 B. & C. 779.

(b) Art. *Domicilium*, 32.

(c) Cocc. Vol. 2.

(d) *Ante*, Vol. 1, p. 151.

(e) 2 Sim. & Stu. 284.

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of a testator dying abroad, is not liable to legacy duty. Not by the local situation of the property; for the personal property follows the person, and is not in any case to be regulated by the *situs* (a); and, moreover, the executor has a year and a day to collect the assets and make distribution, in which he might remove the property from this country, and thus avoid the operation of the act. Not by the residence or situation of the personal representative; for that depends upon accident, survivorship, and the caprice of the party himself. Not by the place of distribution; for in *Hay v. Fairlie* (b), a legacy remitted to an agent of an *Indian* executor, to be paid to a legatee here, was holden to be exempt from duty. It is the domicile of the testator which alone furnishes a leading and clear principle, which embraces every class of persons within the reasonable intendment of the Legislature, and steers clear of every objection. In *Ewin's* case, it was decided, that property in the foreign funds of a testator domiciled in this country was to be considered and disposed of according to the laws of this country, and consequently was liable to legacy duty; and if the converse of that proposition be true, and the same rule applicable to a foreign domicile and *English* property, in no case, where the property through accident is administered in this country, can the payment of legacy duty be avoided. If it were otherwise, and 50*l.* *per cent.* were payable by the *American* law, and the like sum by the law of this country, the legatees would get nothing. The circumstance of proving the will in this country cannot make the duty attach; for then it would be prudent, where a minute part only of the testator's property was in this country, to forego that, rather than subject the bulk of the property to a legacy duty, and for which no administration need be obtained.

(a) *Per Bayley, B., in re Ewin, ante*, Vol. 1, p. 156.

(b) 1 Russ. 117.

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The cases of the *Attorney-General v. Cockerell* (a), and the *Attorney-General v. Beatson* (b), are not opposed to this view of the case; from the former it is doubtful whether the testator had an *Indian* domicile, while, in the latter, the testator died in his passage to this country; and in both there is this main distinction, that the testators were *British* subjects.

*Amos, contra.*—It may be admitted, that the domicile of origin of the testator was in *America*; and it cannot be denied, that the domicile of origin will not be changed by the party leaving it, and going to another country for the purpose of education; but when the deceased went to *India*, and accumulated his fortune there, and resided in *India* from the year 1788 to the year 1818, he acquired a substitutionary domicile, a domicile in *India* in lieu of his domicile by origin in *America*. Upon that point the case of *Bruce v. Bruce* (c) is an authority. Lord *Thurlow* there put this question—A *British* man settles as a merchant abroad, he enjoys the privileges of the place, he may mean to return when he has made his fortune, but, if he dies in the interval, will it be maintained that he had a domicile at home? Even supposing he intended to return home during the time, if he died abroad he would be considered to have been domiciled abroad. Then, having been domiciled in *India*, is there a sufficient weight of subsequent circumstances to create a substitutionary domicile for his *Indian* domicile? There is some evidence tending that way, but not sufficient to satisfy the Court, that that domicile so acquired in *India*, and so substituted, and therefore doing away with the domicile by origin, has itself been done away with.

[Lord *Lyndhurst*.—At sixty years of age this testator

(a) 1 Price, 165. (b) 7 Price, 560. (c) 2 Bos. & Pull. 229.

goes to *New York*, and he begins drawing his whole property into that country—he lives there two years before his death, and engages in agricultural pursuits, is that not strong evidence to shew his domicile?]

It is impossible to say, that those circumstances are not circumstances of weight, tending to shew that his second domicile in *America* has superseded the *Indian* domicile; but still that is not sufficiently made out.

The bulk of his property is not in *America* at the time, and he appoints executors out of that country—these are circumstances which go to shew, that he had not fixed his permanent residence in *America*; and it is doubtful whether the circumstances on the other side are conclusive to shew that he had abandoned his former origin, unequivocally obtained in *India*.

[*Bayley, B.*—He might have two domiciles; he might have a domicile originally, and another domicile by reason of habitation in *India* for a considerable time. But unless he had abandoned the original domicile, his having acquired a second domicile in *India* would not get rid of the first domicile.]

But assuming the testator to have been domiciled in *America*, still, inasmuch as the legacies have been paid here, and an appropriation of the assets has been made here, the legacy duty would attach upon that appropriation, wherever the domicile of the deceased was, or even supposing that the deceased was a foreigner. The legacy duty acts impose the duty in the most plain and intelligible way that it can be imposed, and at the same time in a way the most practicable and feasible for collecting the duty. They impose it upon the payment, upon the appropriation, upon a transaction occurring within their own jurisdiction, upon a transaction occurring in this country, by which an individual receives a benefit conferred upon him under the laws of this country. Supposing it

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were otherwise, supposing it were to depend upon the domicile, if a person domiciled in this country were to make his will here, to constitute executors in *America*, to leave personalty in *America*, which would be the converse of this case, then it would be said, all his money must be in this country, and therefore the legacy duty would be payable upon all his money in this country; but that would not be a practicable or feasible way of exacting the legacy duty, for how could it be paid? The person to pay it is not here, the money out of which to pay it is not here, it is only here by fiction. The legacy acts are not framed with reference to that notional state of things, but they are framed with reference to a transaction upon which they can lay their finger, namely the appropriation in this country by individuals within their own jurisdiction.

[*Bayley, B.*—Then you say, that if an *English* testator, having property in the *English* funds, appoints an *American* his executor and gives legacies to *Americans*, the legacy duty is not payable?]

If the money were in this country, there would be a probate to get the money out of the funds. And an appropriation in this country, which would be necessary where an *American* executor took out probate in this country for the purpose of dealing with those funds, in which case the duty would be imposed.

There might be cases in which the legacy duty might be payable in both countries: and in the case that has been put, as to a legacy paid in *France*, the duty would not be payable in *France*, if there was a *French* executor in this country who distributed the funds in this country; but if the *French* executor in this country distributed not only funds in *France* but funds in this country, then there might be a double duty payable, because he might have to pay the legacy duty upon the administration there, and we should impose a legacy duty upon

the appropriation made here; but if there was no appropriation made here, there would be no legacy duty payable, it would depend upon the fact of an appropriation being made here or not.

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The authorities are all one way, and perfectly precise and clear. What can be more positive than the case of the *Attorney-General v. Cockerell*, where the Court said, "nor does it appear to be sufficiently matter of consideration to inquire where some of these parties died, or where others of them lived, for we think the result would not in any manner affect this case, as in all events the duty clearly attaches upon the payment of the legacies." Again, in *Logan v. Fairlie*, the Vice-Chancellor says—"The sum in question was remitted by the executors in *India* to the defendants, for the purpose of being paid to *Helen Logan*, the residuary legatee; and if *Helen Logan* had been the residuary legatee, and the payment had been made to her accordingly, the legacy duty would not upon any principle have been payable here. But *Helen Logan* had died in the life-time of the testator, and the gift of the residue to her had lapsed, and her children, the plaintiffs, were the residuary legatees; and their bill was filed, not upon the ground of a specific appropriation of this sum to them by the executor, for no such appropriation had been made, but upon the ground of their title under the will as residuary legatees, and because the sum in question was admitted to be part of the testator's residuary estate; the sum therefore was estate of the testator administered here, and the legacy duty is for that reason payable."

The case which has been quoted of *Hay v. Fairlie*, comes under the same principle. The Master of the Rolls says—"The remittances do not come to this country as a portion of the estate to be administered here, under the will of the testator, but as the interest of a sum specifically appropriated in *Bengal*," clearly admitting that if it had

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come into this country in a shape to be administered, and not already administered, the legacy duty would be payable. *Ewing's* case has been misrepresented. That was not determined upon the ground of domicile. The legacy duty was not payable because of the domicile, but it was payable on account of an act done in this country by the executors, and also in consequence of their having made warrants of attorney, by means of which the property was transferred to the legatee.

[*Bayley, B.*—I think it was considered in that case, that the property was, to all intents and purposes, *English* property.]

It was assumed, that if it was the executor's property, there had been an administration by the executor, by means of the act of making the warrants of attorney; but in that case there was another question, which did not arise in any of the former cases upon this subject, which was—Supposing the executor has done an act of administration here, was it the property of the executor to administer? That depended upon two questions—*first*, whether it was personal property; and *secondly*, whether, being personal property, it followed the domicile, and therefore belonged to the executor. The question of domicile was therefore entered into, with a view of ascertaining whether it was the property, and belonged to the executor to administer, for the same purpose as the other question was entered into, whether it was personal property or not; but it was not said, that the duty was imposed there in consequence of the domicile being in *England*. The duty was imposed in consequence of an act of administration done by the executor, in consequence of the warrant of attorney being acted upon by the executor; and the other question was merely to shew, whether the property belonged to the executor. The Legislature imposes the duty upon the payment, and not upon notional and difficult questions of domicile, but upon the plain question of payment; all the

cases are clear in supporting that principle, and in stating that the legacy duty is payable upon the appropriation, and in this case the appropriation has been made in this country, and therefore the duty is payable upon this act of appropriation, whatever the domicile may be.

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*Cur. adv. vult.*

BAYLEY, B.—This case was argued before the Lord Chief Baron, who is necessarily absent from the Court, but concurs in the judgment I am now about to deliver.

The testator's father was a *Scotchman* by birth, he went when young to *America*, fixed his residence there, he married there, and he and his wife lived there, till he and she died. He was born in *Maryland* in the year 1764, he was sent, when he was a young man under twenty-one, to *Scotland*, and in 1788 he sailed to the *East Indies*, and continued there till 1818, a period of about thirty years. In 1788, when he went out, he was entered in the ship's books as an *American*. In 1818, he returned to *Europe*, leaving the greater part of his property he had acquired there behind him in *Bengal*; and then he went to *America* to see his family, and to see some property there which his father had left him. He afterwards left *America*, to visit different parts of *England*, *Scotland*, and the continent, and to make arrangements to remove part of his property to *America*; and on his final return, he commenced drawing his property to the *United States*, and continued to do so till the day of his death, which was the 23rd of *December*, 1826; on which day he died at his residence in *New York*.

He describes himself in his will as "late of *Calcutta*, and now of *Richmond*, in the county and state of *New York*." By his will, he gave legacies to persons then resident, some in *Great Britain*, some in *India*, and some in

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*America.* He left personalty in *England* under 10,000*l.*, and he left legacies to *English* residents to a considerable amount, probably an amount exceeding 30,000*l.*, because there is now appropriated in *Chancery* a fund for the payment of the legatees to the amount of 33,975*l.* The probate duty has been paid, and a bill has been filed by some of the *British* legatees for an account; 33,975*l.* has been apportioned between the *British* legatees; and the question is, whether the legacy duty is payable upon that sum: and upon consideration we are all of opinion that the legacy duty is not payable.

Upon the facts stated, it seems to us to be clear that he was, at the time of his death, a citizen of the *United States*, and not a *British* subject; and his personalty, wherever situated, was to be deemed not *British*, but *American* property, and neither himself nor his property were liable generally to be bound by *British* statutes, or to contribute to the support of the *British* Government. He was born, indeed, in what, at the time of his birth, was within the *British* dominions; but, upon the treaty between this country and the *United States*, he had the option of continuing a *British* subject, if he should elect *Great Britain* as his country, or of ceasing to be a *British* subject, and becoming to all intents and purposes an *American*; and it seems to us that he made his election for the latter. In 1788, which was after the period at which the treaty between this country and the *United States* took place, he passed as an *American*, he was so entered in the ship's books, he described himself as an *American* in his will, and he is resident in *America* when he dies. He was not therefore liable, nor was his personal property, as it seems to us, liable to the statutes of this realm. The acts of our Parliament were not binding upon him, and he had a right to transmit the personal property which he had here to whom he would, free from every *British* burden.

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Had he made foreign executors, and given no legacies except to foreigners, there can be no doubt but that the executor would have been entitled to have removed the whole of the property from this kingdom, and to have paid the foreign legatees in full, without deduction, subject to no burden in this country, except the single burden of the probate duty, which would be to be imposed upon his property which he suffered to be in this kingdom. If his executors had been foreigners, or if the legatees had been foreigners, then they would not have been liable to the legacy duty; how can it make any difference that the executor is a subject of this realm; he is merely the medium by which the property belonging to the testator is to be distributed; can it make any difference that the legatee is a subject of this kingdom? If the legatee had been a foreigner, he would have got his 100 *per cent.*; and it is a great discouragement against a testator leaving his property to a *British* subject, that, instead of leaving him 100 *per cent.*, he can only leave him 90 *per cent.*, because the residue of the property will be to be given to persons who constitute the state of this kingdom.

Therefore, upon the principle that he is not a *British* subject, not bound by the laws of this kingdom, and that he is entitled to consider his property, though locally here, as not being *British* property, but *American* property, we are all of opinion, that the legacy duty in this case is not payable; and the circumstances I have mentioned plainly distinguish this case from the authorities of the *Attorney-General v. Cockerell*, and the *Attorney-General v. Beatson*, and *Logan v. Fairlie*; for, without expressing any opinion, with reference to the two cases lately decided, whether the legacy duty would or would not be payable, where the testator was a *British* subject, not resident in *Great Britain* when he made his will, and in respect of property which he happened to have in this

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kingdom at the time when he made his will, without, I say, expressing any opinion upon that question, we are of opinion that the cases of the *Attorney-General v. Cockerell*, and the *Attorney-General v. Beatson*, and *Logan v. Fairlie*, are distinguishable in this respect—that there the property was the property of *British* subjects, and the testators in each of those cases were resident in *India*, and they were originally *British* born. They were, therefore, liable to be bound by all acts of Parliament sufficiently comprehensive to include them, made by the *British* Parliament; and that, as it seems to us, is not the case with this testator. The legacy duty is in substance a burthen upon the testator's property; whereas, if he were not to be bound by the laws of this country, every 100*l.* which he proposed to give would pass into the hands of his legatee, whilst a decision that his property was liable to the burdens of this kingdom, would prevent any *English* legatee from taking more than 90*l.* That, as it appears to us, is not the principle, and would be inconsistent with the principle upon which we think these acts of Parliament ought to be construed. We are therefore of opinion, that the legacy duty in this case is not payable, and the rule must be

Discharged.

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EVANS v. MORGAN and MORRIS and JANE, his Wife.

**ASSUMPSIT** on a promissory note for 30*l.*, made by defendant *Morgan* and *Jane Morris* before her coverture. Plea—General issue.

At the trial before *Bolland*, B., at the last Spring Assizes for the county of *Carmarthen*, the facts were as follows—Upon the death of the plaintiff's grandfather, who was tenant of a farm, the plaintiff, who had resided on the farm with him, remained in possession. The goods and crops, &c., on the premises had been seized for rent; but *Davis*, the steward of the landlord, said, that if the plaintiff would quit immediately, he should be allowed to sell the crops, manure, &c. to the incoming tenant, the defendant *Morgan*, who had taken the farm. The parties accordingly met at a public-house, and, by the intervention of *Davis*, the plaintiff and *Morgan* (as the incoming tenant) came to an agreement, by which the plaintiff agreed to sell the manure and crops on the farm for 30*l.*, and *Morgan* agreed to buy the same, if the plaintiff would give him quiet possession of the farm on the next morning; and the plaintiff was to pay the rent of 1*s.* a-week to *Morgan* for a few weeks, during which he was to continue in possession of the house.

Plaintiff, who was the grandson of the deceased tenant of a farm, remained in possession after his grandfather's death. A bargain was made between plaintiff and M., an incoming tenant, who had agreed to take the farm from the landlord, by which bargain M. was to give the plaintiff 30*l.* for the crops, manure, &c., to be secured by the promissory note of M. and a surety, which note was to be held by D., and was to be by D. attested and handed over to plaintiff, if plaintiff delivered up the possession of the lands on the next morning, but he was to remain in possession of the house for a few weeks, at a rent of 1*s.* a-week, to be paid to M. The note

In pursuance of this agreement, the note declared upon was drawn at the time of the agreement to secure the payment of the 30*l.*, and was signed by *Morgan*, and by

was accordingly drawn with a clause of attestation, and was signed by M. and his surety, and handed to D. The next morning, upon M. and D. requesting plaintiff to give up the possession, he refused to give up the *place*; but there was evidence that, on that day, M.'s cattle were on the lands, and that plaintiff's were not. Plaintiff kept possession of the house for three weeks, when he was turned out by a constable. The note was never attested, and it was not proved how the plaintiff got it into his possession:—*Held*, in an action by the plaintiff against the makers of the note, that a jury were warranted in saying that the bargain had been complied with on the part of the plaintiff.

In an action against husband and wife, on the note of the wife made *dum sola*, a witness stated that he knew *A. B.* (the wife) formerly, and had heard that she afterwards married *F. P.* (the husband). The witness was not cross-examined:—*Held*, sufficient *prima facie* evidence of marriage.

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the wife of *Morris*, who was then a single woman, as surety for *Morgan*. The note was not, however, given to the plaintiff, as it was thought that he might keep it without delivering up the possession of the farm, according to the agreement; but, with a view to insure his giving up possession, the note was given to *Davis*, who was to deliver it to the plaintiff if he gave up the possession next morning; and he was, in that event, to attest the note.

The note never was attested by *Davis*. On the morning after the agreement the plaintiff refused to give up possession of the place to *Davis* and *Morgan*, who went to the farm to demand it from him. A witness proved, however, that the plaintiff's stock were not on the farm, and that some of *Morgan's* cows were there on the morning in question. It did not appear by what means the promissory note came into the plaintiff's hands. Three weeks after the agreement, the plaintiff, who kept possession until that time, was turned out of the house by a constable, at the instance of the landlord's agent.

The only evidence of the marriage of the two defendants, *Morris* and his wife, was that of a person who did not appear to be related to them, or to live near them, or know them intimately; and he proved only that he knew the defendant, *Jane Morris*, when she was *Jane Rees*, and that he had heard that she had since married *Morris*. This witness was not cross-examined.

On these facts, it was objected that there was no sufficient evidence of the marriage of the defendants *Morris* and his wife; and that the plaintiff could not recover, as the note was to be delivered on a condition which had not been performed on the part of the plaintiff.

The learned Baron gave the defendant leave to move to enter a nonsuit, and left it to the jury to say whether the consideration of the note had wholly failed or not; and whether the possession had been given up or not;

and he told them, that, if they thought that the defendant had had the value, he was of opinion, that any misconduct of *Davis*, the steward, as to the note, would not alter the plaintiff's right of recovering upon it.

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*Maule* moved for a nonsuit or new trial.

*First*—The note was only to be delivered if the condition of giving up the farm on the next day was performed by the plaintiff. Neither was it attested by *Davis*. A party cannot sue on a note, unless he has bound himself not only by signing the note, but by a delivery. [*Bayley*, B.—You say, that it was delivered under such circumstances, that, if it had been a deed, the delivery of it would have been as an *escrow*.] Yes. It was delivered on a condition; and it lay on the plaintiff to prove the performance of that condition, which he did not do.

But, *secondly*, the marriage of the female defendant to *Morris* was not proved. There was no evidence of their living together as man and wife, or of the reputation of the neighbourhood. It was the mere hearsay of a stranger, who proved that he had heard, that she afterwards married *Morris*. This is much too loose to be even *prima facie* evidence of a marriage.

*Thirdly*—The learned Baron misdirected the jury. He left it to them to say if the consideration had wholly failed or not; and he told them, that, if they thought that the plaintiff had received the value, *Davis's* misconduct could not alter the plaintiff's right to sue upon the note. It is submitted, however, that the question ought not to have been so left to the jury; but that they ought to have been told that the question was, whether the condition on which the note was to be delivered had been complied with.

Rule *nisi* granted.

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*John Evans* now shewed cause.

The only difficulty arises from confounding the not giving up possession of the house and the land. The house was not given up for some time; and by the bargain it was not to be given up the next morning;—as to the farm, there was evidence that the defendant's stock was upon it on the morning in question. The learned Baron was, therefore, perfectly right in leaving it to the jury to say whether or no the defendant had the value; and there was evidence, on which they were authorized to find, that the condition had been complied with.

As to the point of marriage, he was stopped by the Court, Lord *Lyndhurst*, C. B., observing, that it did not appear that the defendant's counsel had cross-examined the witness as to the expressions used by him relative to the marriage; and he said, that if they had intended to take the objection, they should not have left it on such a loose expression, but should have inquired what the witness meant by saying, that he heard that they were married.

*Whitcombe.*—Though reputation is held sufficient *prima facie* evidence of a marriage, yet it has never been held that such loose evidence as this amounts to evidence of reputation. [*Bayley*, B.—It goes to shew the reputation of the neighbourhood. Lord *Lyndhurst*, C. B.—If you do not cross-examine on such a point, you must take these expressions in the ordinary sense.] The expression does not amount to any thing like a general reputation. In an action for goods sold and delivered to the wife, in which case the least strict proof of the marriage is required, the case is never left on such evidence as this: there is always some proof of the parties living together, of the reputation of the neighbours, or of the conduct or declarations of the parties, or the declarations of their relatives or friends.

*Secondly.*—The plaintiff did not make out, as it lay on him to do, that the condition on which the note was to be delivered up by *Davis* to the plaintiff had been complied with. If that condition was not complied with, then, though *Davis* in point of fact delivered up the note, still it was no delivery in point of law.

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[Lord *Lyndhurst*, C. B.—The note was delivered to *Davis*, to be by him given up to the plaintiff on a condition. That condition was complied with. *Davis* was then bound to deliver it up; and if he had not done so, it would have been a wrongful act on his part. It was a question for the jury to say, whether the condition was complied with.]

The condition was not complied with. Even if the possession passed that day, the condition, which was the giving up possession in the morning, would not have been performed. It might be that the plaintiff changed his mind in the course of the day, but in the morning there was a clear demand and refusal.

[*Bayley*, B.—The expression “place” was equivocal, and might refer either to the house or the land. A witness proved that the plaintiff had none of his stock on the land. Lord *Lyndhurst*, C. B.—Suppose that there had been a distinct refusal in the morning, and the situation of the parties remaining the same, the possession had been given up in the course of the day.]

As against Mrs. *Morris*, who was only a surety, such a giving up of the possession would have been no compliance with the condition, upon the performance of which the note was to be delivered, and was to take effect as a note; as against the surety the parties had no right to enter into new terms.

[Lord *Lyndhurst*, C. B.—Her being a mere surety might make a difference on such a supposition.]

The instrument, in point of fact, was not a promissory

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note until delivery: besides, it was not to have operation as a note until *Davis* had attested it.

[*Bayley*, B.—Any neglect in *Davis* to subscribe his name would not deprive the plaintiff of his remedy, if he had done all which it was incumbent on him to perform.]

*Lastly*.—The learned Baron was wrong in leaving to the jury, whether the consideration for the note had wholly failed or not; and telling them, that, if they thought that the defendant had the value, any misconduct of *Davis* could not affect the plaintiff's right to sue upon the note.

[*Bolland*, B.—I left it to the jury to say, whether the possession was given up or not. *Bayley*, B.—Part of the summing up was distinctly on that point.]

The real question was, whether the condition was performed by the possession being given up, according to the terms of the bargain, and at the time when the defendant *Morgan* was entitled by the bargain to require it.

LORD LYNTHURST, C. B. — The summing up of the learned Judge amounted to this, whether or no the bargain was performed; if it were, the plaintiff was entitled to recover. As to the question on the evidence of the marriage, it appears to me that there was sufficient evidence of the reputation, that the parties were living together as man and wife. As to the remaining question, whether the condition on which *Davis* was to deliver up the note was complied with; that seems to me a mere question of fact for the jury. I think that the balance of the evidence warranted them in the verdict which they found; but it is sufficient to say that it was a question of fact for their decision.

BAYLEY, B.—I am of the same opinion. There appears

to me to have been sufficient *prima facie* evidence of the marriage. There was no cross-examination on the part of the defendant upon this point, and the want of proof of the marriage was not put to the Judge as a ground of nonsuit, but it was urged by the counsel in his address to the jury; if it had been put to the Judge, the plaintiff would have had the opportunity of supplying the defect by calling further evidence on the point. Then, as to the real merits of the case:—It appears that the parties met at a public-house, a bargain was made for the sale of the crops and manure, and a note was to be given for the amount. This note was drawn, and was put into *Davis's* hands for him to hand over to the plaintiff, on condition that the possession of the farm was delivered up by him on the following morning. Was there, then, evidence in the cause that the possession was delivered up accordingly? I think that the fact, that the defendant's cattle were seen on the farm that morning, and from time to time afterwards, and that the plaintiff had no stock on the premises, was strong evidence from which the jury might infer, that the possession had been given up according to the bargain. It is certainly true, that one witness stated, that the plaintiff refused to quit the place, and he was afterwards turned out of the possession of the house. It was not part of the bargain, however, that the house should be delivered up on the next morning; and his refusal, being in ambiguous terms, might have referred to the house. It seems to me, therefore, that if this case were to go down again for the decision of another jury, the same points would be submitted to them, and that they would be warranted in coming to the same conclusion. I therefore think that this rule should be discharged.

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VAUGHAN, B.—I think that the conclusion at which the jury have arrived may well be supported. The proof of reputation of the marriage was very slight; but still I

think that there was *prima facie* evidence of reputation of a marriage. I think, also, that there was evidence of the condition being performed. That condition was the giving up possession of the land, and the defendant had his cattle on the land on the day in question. There was evidence the other way, but still the question was for the jury; and it appears to me that the evidence for the plaintiff was the stronger. If so, *Davis* was bound to give up the note to the plaintiff; and if he were bound to give up the note, it is clear that the plaintiff has a right to sue on it, notwithstanding any wrongful act of *Davis*. The case, therefore, was left to the jury, on the exact grounds on which it ought to have been left to them, and this rule must be discharged.

BOLLAND, B., concurred.

Rule discharged.

#### DAY v. WILLIAMS.

*A.* devised an estate to trustees for years, with remainder to *B.*, which *B.*, 18 years after the death of *A.*, treated as his freehold, and leased for lives. In an action by the lessee of *B.*, as reversioner, the jury were told, that they could not presume a surrender of the term by the trustees to *B.*; and, upon motion, the direction was held to be right.

CASE by the plaintiff, as reversioner, against the defendant for undermining a dwelling-house of the plaintiff. At the *Carnarvon* Assizes, before *Bosanquet*, J., the plaintiff proved his title by shewing perception of rent; upon which, evidence having been given of the injury, the defendant produced a lease of the premises in question, from the Marquess of *Anglesey* to the plaintiff, for lives; and likewise the will of the late Lord *Uxbridge*, who had been dead about eighteen years, by which he devised the premises in question to trustees for a term of years, in trust to pay annuities, and for certain other purposes mentioned in the will, with remainder to Lord *Anglesey*. The plaintiff insisted that it was for the jury to decide, whether the term had not been surrendered, and relied upon the manner in which the property had

been treated by Lord *Anglesey*, as leading to that inference; but the learned Judge told the jury, that they could not presume a surrender of the term; and a verdict was accordingly found for the defendant.

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*John Jervis* moved for a new trial; and submitted that the question was withdrawn from the jury, by the direction of the learned Judge; and that the circumstances did fairly lead to an inference of the surrender of the term.

BAYLEY, B.—Is there any case where a surrender has been presumed within twenty years? I do not think that a jury ought to be required to presume what they do not believe. I have frequently talked with Lord *Tenterden* on the subject, and we have agreed in thinking that the rule, as to presuming surrenders, has gone far enough, and that it ought not to be extended. A Judge ought not to require a jury to find on their oaths what he does not himself believe. In the present case, if a surrender had really taken place, it must have been known to many individuals.

Rule refused (*a*).

(*a*) It was subsequently discovered, that the term had many years ago been surrendered by the trustees to Lord *Anglesey*.

#### MORGAN v. HARRIS.

**ASSUMPSIT** for work, labour, and materials. Particulars had been delivered under a Baron's order, and had also been annexed to the record pursuant to the rule T. T. 1 W. 4. The particulars delivered stated the claim to be for work done and materials found during the months

Where the plaintiff annexed to the record particulars varying from those delivered to the defendant, and, there being no evidence of

the particulars delivered, got a verdict upon an item not included in the particulars delivered, the Court granted a new trial without costs; but refused to nonsuit the plaintiff, because the defendant was not in a condition to raise the question at the trial, and the point was not reserved.

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of *March, April, and June, 1826*, and in the month of *March, 1827*; that annexed to the record contained these additional words: "Also for work done at different times, from about *June, 1826*, to *August, 1827*."

At the trial, before *Bolland, B.*, at the last *Carmarthen Assizes*, the plaintiff claimed for work done in *August, 1826*, a period not included in the particulars delivered, but comprehended within that annexed to the record; upon which it was objected, that the plaintiff was precluded, by the particulars delivered, from going into such evidence; but upon examining the particulars annexed to the record, the discrepancy was discovered, and, the defendant not being prepared to prove the delivery of the particulars to him, the plaintiff had a verdict for 20*l*.

*John Evans* having obtained a rule to shew cause why a nonsuit should not be entered, or a new trial had upon the discrepancy in the particulars, which was proved by affidavit; and also why a new trial should not be had, the verdict being against the evidence—the learned Baron, after reading his notes of the evidence, certified that he was not satisfied with the verdict. And

*E. V. Williams* shewed cause.—The variance between the dates in the particulars was not calculated to mislead the defendant, and in fact had not that effect; for he was prepared at the trial to meet the plaintiff upon the items claimed; and upon the balance of the evidence the plaintiff's claim was sustained. The defendant therefore is not now in a condition to claim relief; he offered all the evidence he could upon the items; and if the case goes down again, it must be attended with the same result; and the particulars may be amended. The particulars annexed to the record require no proof; *Macarthy v. Smith* (a); but, as it must be admitted that they

(a) 8 Bing. 145; 1 Moore & S. 227.

were not the real particulars, undoubtedly, if the defendant had been in a condition to prove the delivery of the particulars to him, the plaintiff might have been shut out of the evidence. However, he was not in a condition to do this; and as no leave was reserved, and the point almost abandoned at the trial, the rule for the nonsuit cannot be made absolute. He also argued, that the verdict was supported by the evidence.

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*J. Evans and Whitcombe, contra.*—If this rule be not made absolute for a nonsuit, the rule with respect to particulars, which was framed with a view to save the expense of proving the delivery of the particulars, will be defeated; for, it will in no case be safe to trust to the particulars which are annexed to the record. If the rule had been complied with, the defendant might have insisted upon a nonsuit, as there was no evidence to meet any claim inserted in the particulars; and if this consequence must have ensued had the plaintiff's attorney acted *bond fide*, surely he is not to benefit by his own wrong.

Lord LYNDBURST, C. B.—If the defendant had been in a condition to raise the point at the trial, by shewing the discrepancy between the particulars delivered and those annexed to the record, and the point had been reserved, we might have ordered a nonsuit to be entered. But, even with that evidence, the plaintiff might have insisted upon his case going to the jury. We, therefore, have no power to enter a nonsuit, although the defendant is en-

it might have been reserved, and, in that case, we might have interfered. When leave is granted to move to enter a nonsuit, it is done upon an understanding, that the plaintiff acquiesces in that course; for, if he pleases, he may insist upon having his case submitted to a jury. We can, therefore, do no more than grant a new trial, and the defendant may, if he pleases, move that the plaintiff's attorney pay the costs of the first trial.

Rule absolute for a new trial, without costs.

PIM v. WOODMAN.

The plaintiff filed a declaration, which was bad on special demurrer; the defendant imparled, and then demurred specially—The Court refused to allow the plaintiff to sign judgment, because the imparlance did not estop the defendant from objecting to the form of the declaration.

THE declaration in this case, which was filed the day after *Hilary* Term, was intitled generally as of *Hilary* Term, and stated that the plaintiff came into Court on the 11th day of *January*, and complained by bill, that the defendant was, on the 20th *January*, indebted to him. The defendant applied for and obtained an imparlance, and afterwards, in *Easter* Term, demurred to the declaration, assigning as special cause, that the bill appeared by the declaration to have been exhibited before the cause of action accrued.

*Mansell* now applied for leave to sign judgment, treating the demurrer as irregular; and contended, that, by imparling, the defendant was estopped from objecting to the form of the declaration; and that it must be assumed that the bill was exhibited in proper time. He cited *Thompson v. Collier* (a), where it is said, that the defendant, "by entering on his defence, and by his imparlance, accepts

(a) Yelv. 112.

DAVIS v. SALTER and Others, Executors.

Where an injunction had issued against the defendants in an equity suit, restraining them from disposing of the estate of their testator, the Court refused to stay proceedings against them in an action in which the debt was not admitted, observing that the injunction might be a ground for applying to stay execution.

**T**HE defendants were the executors of *Thomas Salter*, deceased; and in a suit in equity against them, an injunction had issued injoining them from proceeding to sell or assign the lease in the pleadings of the cause in equity mentioned, or collecting any debts, or disposing of any of the personal property, stock in trade, or effects, belonging to the estate of the testator. Pending this injunction the present action was brought.

*Knowles* now moved, on the part of the defendants, to stay the proceedings, and urged, that, if they were to pay the present demand, they would commit a contempt of the Court of equity; and if they resisted the demand, costs might be unnecessarily accumulated against the estate.

BAYLEY, B., (after inquiring whether the defendants were ready to admit the debt, and being answered in the negative)—Then your application is too early. The plaintiff has a right to have his debt ascertained. The injunction may be a ground for applying to stay the execution.

Rule refused.

DOWNES v. CROSS.

Where the defendant's attorney had agreed with the plaintiff's attorney to accept short notice of trial, or no notice at all; and, in consequence of this arrangement, no notice was given, but both parties attended the assize town with their witnesses, and the plaintiff's attorney did not enter the record:—*Held*, that the defendant was not entitled to judgment as in case of a nonsuit.

**KNOWLES** moved for judgment as in case of a nonsuit in a country cause, on an affidavit stating that this was an action of trespass, commenced pending another action of trespass between the same parties; and that

sequence of this arrangement, no notice was given, but both parties attended the assize town with their witnesses, and the plaintiff's attorney did not enter the record:—*Held*, that the defendant was not entitled to judgment as in case of a nonsuit.

after plea an arrangement had been made between the attornies on both sides, by which, in consideration of some stipulation for the convenience of the defendant, the defendant's attorney agreed to take short notice of trial, or no notice at all. In consequence, no notice of trial was given; but both parties attended the assize town with their witnesses, and there, on the commission day, the plaintiff's attorney gave notice to the defendant's attorney, that the record would not be entered. This, he contended, placed the parties in the situation contemplated by the act of Parliament, (14 Geo. 2, c. 17), which did not require that notice of trial should have been given, but only that the plaintiff should have neglected to take his cause down to trial, according to the practice of the Court.

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BAYLEY, B.—If a notice of trial had been given, the defendant would have been entitled to judgment as in case of a nonsuit. No notice was actually given; but it is said that the agreement to take no notice was equivalent to notice. In my opinion, it was not equivalent to a notice for the purpose of this motion.

BOLLAND, B., concurred.

Rule refused.

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*Knowles* afterwards obtained a rule on the same affidavit for the costs of the day for not proceeding to trial.

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## TOWNSEND v. BURNS.

An affidavit to hold to bail stated that the defendant was justly and truly indebted to the plaintiff in 25*l.*, by virtue of an agreement, whereby the plaintiff agreed to procure a lease to be granted to the defendant, and the defendant agreed to pay the plaintiff, his solicitor or agent, 25*l.* in full, for his share or proportion of the costs and expenses of the agreement, and of the lease and counterpart, and of a proposal to be laid before a Master in *Chancery* for a grant of the lease; the lease and counterpart being to be prepared by the plaintiff's solicitor: and that the plaintiff did procure a lease to be granted, which was prepared by the plaintiff's solicitor; but did not state that the plaintiff had paid the solicitor, or had himself borne or incurred the expenses:—*Held*, insufficient.

THE affidavit to hold to bail in this case was made by the plaintiff, a receiver appointed by the Court of *Chancery*, and one *Seabrook*, and stated that the defendant was indebted to the plaintiff in the sum of 25*l.*, upon and by virtue of a certain memorandum of agreement made the 12th day of *January*, 1832, between the plaintiff and the defendant; whereby the plaintiff, for the considerations therein mentioned, did agree with the defendant to cause or procure to be granted unto the defendant, a good and sufficient indenture of lease of a certain messuage or tenement, situate and being No. 1, *Prince's Place, Lambeth*, in the county of *Surrey*, together with the appurtenances thereto belonging, for the term of 21 years, from the 25th day of *December* then last, determinable at the end of the first 7, 14, or 21 years of the said term, at the option of either party, at the yearly rent of 65*l.*, payable quarterly as therein mentioned, and subject to the covenants therein also mentioned; that the defendant did, in and by the said memorandum of agreement, agree with the plaintiff, and also with the parties then vested with the legal estate or entitled to the rents and profits of the said premises, to accept such lease upon the terms and conditions aforesaid, and to execute a counterpart thereof, on request of the plaintiff, or his solicitor, or agent; and also that he the said defendant would, upon the like request, pay to the plaintiff, his solicitor or agent, the sum of 25*l.* in full for his share or proportion of the costs and expenses of preparing and executing the said agreement or in relation thereto, and also of or occasioned by the preparing and carrying into effect such lease and counterpart, and also of the proposal to be laid before the Master for granting the said lease, and all other expenses incident thereto; and that it was thereby further agreed, that the said lease and counterpart should

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BURRA.

be prepared by him. The intention must have been that the plaintiff should be liable to his own solicitor in the first instance; and the stipulation for the 25*l.* to be paid to him, was for his reimbursement by the defendant of the defendant's share of the expenses.

*Kelly*, in support of the rule.—This affidavit does not state that the expenses were borne by the plaintiff, or that the other things were done which were to entitle him to the 25*l.* It does not even appear that the expenses were incurred by the plaintiff, nor that any application was made to the Master. Even in a declaration on this agreement, it would be necessary to make averments of those matters; and the rule is much more strict in an affidavit to hold to bail, in which nothing is to be supplied by inference. The affidavit ought to have shewn that expenses had been incurred in preparing the agreement, the lease and counterpart, and in laying the proposals before the Master. Without having recourse to inferences, the Court cannot say that there has been such expense, nor that the work in laying the proposal before the Master has been done. A declaration omitting such averments would be bad in arrest of judgment; besides, it does not appear that what has been done has been done by the plaintiff. It should, at all events, have appeared that he had paid the solicitor. It is quite consistent with the present affidavit, which only states that the lease was prepared by the plaintiff's solicitor, that the defendant may himself be personally liable to that solicitor for these expenses.

BAYLEY, B.—I am disposed to think that the present rule ought to be made absolute. The ground of my judgment is, that there is no allegation that the plaintiff has himself borne the costs and expenses of the lease, which, I think we may collect from the agreement, were

# HALL v. WELCHMAN.

The old process might be made returnable on a day between the Thursday before and Wednesday after Easter-day.

A WRIT of *venire facias ad respondendum* was made returnable on *Saturday* the 21st *April*, being the *Saturday* before *Easter-day*; upon which ground—

*Mansell* moved to set it aside for irregularity, contending that, by the statute 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 6, the days intervening between the *Thursday* before and the *Wednesday* next after *Easter-day* were not days in term, or at all events not juridical days (a); and, therefore, that writs, which, in contemplation of law, were returned before the Judges sitting *in banc*, could not be returnable in such days. He also relied upon the rule of Court of this term, (*post*), which directs that such days should not be reckoned or included in any rules, notices, or other proceedings, except notices of trial, as a judicial exposition of the statute.

BAYLEY, B.—The meaning of the statute is, that the Judges are not to sit *in banc* on those days.

The Barons took time to confer with the Judges of the other Courts, and afterwards—

Lord LYNTHURST said, that they had conferred with the other Judges, and the result was, that, in their opinion, the writ was properly returnable; and, consequently, the rule was

Refused (b).

(a) See *Henworthy v. Peppiat*, 4 B. & Ald. 288.

(b) Upon a similar point in the K. B., *Lilly v. Gompertz*, 1 Dowl. P.C. 376, *Taunton, J.*, said, "I have conferred with the other Judges, and we are all of opinion that, under the late act of Parliament,

those days, though not *dies juridici* for the sitting of the Court *in banc*, are to be taken as part and parcel of the term; and, therefore, that it was no irregularity that this *latitat* was made returnable on the *Saturday* before *Easter-day*."

BOWLES v. BILTON and Another.

If a plaintiff issues a *venire* against two persons, he may declare against one only.

**THE** plaintiff having issued a *venire fac. ad resp.* against two persons, and declared against, and served notice of declaration upon one only—

*Archbold* moved to set aside the notice of declaration for irregularity, upon the ground of this variance.

**BAYLEY, B.**—The plaintiff has declared against one defendant only, which he may do upon the process of *venire*. Such is the rule in non-bailable actions in the *King's Bench*, and such in principle should be the practice here.

Rule refused.

COULSON v. KING.

A defendant, who seeks to set aside the service of process upon the ground that it was served out of the proper county, must shew by affidavit that the place where he was served was not on the confines of the county.

**A** RULE having been obtained by *Tyrwhitt* to shew cause why the service of process should not be set aside for irregularity, upon an affidavit which stated that the defendant had been served with a copy of a writ, directed to the Sheriff of *Middlesex*, at his house, some distance from the county of *Middlesex*—

*Chilton*, who shewed cause, produced an affidavit that the defendant's house was but a few yards distant from the county of *Middlesex*; and cited *Storer v. Rayson* (a), to shew that it was incumbent upon the defendant, in such motions, to negative the fact, that the place where the writ was served was on the confines of the county.

*Tyrwhitt, contra*, admitted the rule stated to be the

(a) 3 B. & C. 158.

practice of the Court of *King's Bench*, but referred to the dictum of *Wood, B.*, in *Monday v. Lear* (a), to shew that the practice in this Court was different.

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1832.

COULTON  
v.  
KING.

*Per* BAYLEY, B.

Rule discharged.

(a) 11 Price, 122.

### PERRY'S Bail.

THE defendant gave notice of bail, and on *Monday* the 30th *April*, before 11 o'clock, gave a further notice that other bail would be added to those already put in, and would justify in open Court on the 2nd *May*. On the 30th *April*, at 2 o'clock, a summons was taken out to change the bail, by substituting the added bail for those originally put in, but no order was made thereon until the morning of justification.

It is not necessary to give four days' notice of bail, who are added by a Judge's order.

*John Jervis* opposed the justification, submitting that the practice of adding bail had been abolished by the rule T. T. 1 W. 4, s. 5, and that the substituted bail were to be considered as new bail, and, consequently, that a four days' notice of putting in and justifying at the same time was requisite.

BAYLEY, B.—A notice of bail, who are to be put in, and justify at the same time, must be given four days before the justification; but that rule only applies where no bail have been originally put in. Here bail were pro-

of the bail until he knew that the order was made, he may, if he so please, have time to make the necessary inquiry.

*John Jervis* applied for the costs of appearing to oppose the bail, which being refused, he examined the bail, who justified.

JONES, Assignee of THOMAS, v. OWEN.

A defendant paid into Court 1*l*. 3*s*. 7*d*. under an order which did not contain the usual undertaking from the defendant to pay the costs; and it being doubtful whether the plaintiff, if he accepted that sum, would be entitled to costs, the defendant offered to give the plaintiff judgment of the term for that sum, in order to take the opinion of the Court upon the question; the plaintiff, notwithstanding, took the cause to trial, and, upon the production of the rule to pay money into Court, had a verdict for one shilling; the Court, upon motion, ordered the plaintiff to pay to the defendant all costs incurred subsequently to the offer.

**ASSUMPSIT** for goods sold, &c. Plea—the general issue. *Thomas*, the insolvent, who lived in *Cardiganshire*, and had been the editor of a periodical work there, had been in the habit of consigning his works by a carrier of his own to the defendant, who lived in *Anglesey*, for the purposes of sale, upon the terms of sale or return, and charged the defendant with the trade price. Before his insolvency, a traveller, in the employ of *Thomas*, had called upon the defendant, when, upon a statement of accounts, the sum of 7*l*. 6*s*. 6*d*. was found to be due to the insolvent; which the defendant, as was then supposed, discharged, by the return of several unsold copies, and by paying the balance in cash. However, it was subsequently discovered that a balance of 1*l*. 3*s*. 7*d*. was due to the insolvent; and, his assignee having brought an action against the defendant, a summons was taken out by the latter to stay proceedings upon payment of that sum; but the plaintiff's attorney refused to accept that amount unless the defendant would pay the costs, and disclose for what sum the action was brought. The defendant contended that the amount in dispute was beneath the dignity of the Court, and that, as, if the amount were ascertained at that sum, the Court would stay the proceedings without costs, he was not bound to pay the costs of the plaintiff, who, by accepting the sum offered, admitted that that amount only was in dispute. Ac-

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1832.

JONES  
v.  
OWEN.

Upon the motion of *Whitcombe*, the Court granted a rule to shew cause why the verdict should not be set aside, and the proceedings stayed, and why the plaintiff should not pay the costs incurred after the payment of the money into Court.

*Evans* and *E. V. Williams* shewed cause, and contended that the rule of Court was not substantially varied by the omission of the undertaking to pay the costs when taxed; and that, as the defendant had refused to pay the costs, the plaintiff was entitled to nominal damages by the mere production of the rule (a). They also argued upon a discrepancy which appeared in the affidavits.

*Whitcombe* (*J. Jervis* was with him), *contra*.—It is established by the cases of *Fleming v. Davies* (b) and *Bateman v. Smith* (c), that a plaintiff, who sues in a superior Court for a sum above 5*l.* or 40*s.* defendants who reside within the jurisdiction of a Court of Requests or County Court, will lose his costs if he recover less than those sums; and it is a rule that a superior Court will not entertain actions for sums below 40*s.*, and which may be recovered in a county court. Now, here the cause of action arose wholly in *Anglesey*, for the goods were delivered there by the insolvent to the defendant, and the course which the plaintiff pursued shews clearly that he proceeded to recover the sum which was paid into Court. This sum he might have had without proceeding in the action, and, as the defendant has been put to great expense by the conduct of the plaintiff, the plaintiff ought to pay the costs incurred subsequently to the rule of Court. He was then stopped by the Court.

BAYLEY, B.—This verdict ought to be set aside, and the

(a) 1 Tidd, 626.

(b) 5 D. & R. 371.

(c) 14 East, 301.

plaintiff should pay to the defendant all costs incurred subsequently to the 8th *March*, the date of the first letter from the plaintiff's attorney. The money was paid into Court upon an order, which, by the direction of the Court, deviated from the common form, in order that the subject of costs might undergo a fair discussion. That question was agitated before a learned Baron at chambers, on the 22nd *February*, but his attention was not drawn to the order of Court, which should have been produced by the defendant's attorney. Up to that period, and afterwards, until the 8th *March*, there was nothing to shew that the plaintiff was not entitled to his costs; for, if the cause of action had arisen partly in one county and partly in another, the county court would not have had jurisdiction. On the 8th *March*, however, during the existence of the order of the 31st *January*, the defendant's attorney wrote to the agent for the plaintiff's attorney, to ask if the plaintiff was proceeding for 1*l.* 3*s.* 7*d.* only, or for further damages. Now, a plain answer, which would have saved all the subsequent expense of the trial, was not given to this application, and the defendant's attorney again wrote, to say that he should consider the plaintiff as going for damages above 1*l.* 3*s.* 7*d.* if a clear answer was not given to the contrary before a day named, but that he was willing to give the plaintiff a judgment after the four first days of this term, for the sum paid into Court. No answer was sent to this letter, which was returned by the post. From this the defendant's agent would naturally suppose that it was the intention of the plaintiff to proceed; and the attorney of the defendant in the country, having no communication to the contrary from his agent, would be justified in supposing that the plaintiff was proceeding for a larger sum. But, does he proceed for a larger sum? On the contrary, he is contented with a verdict for one shilling, clearly shewing that his object was the costs, which would more properly have been decided had the plaintiff accepted the defendant's offer on the 8th *March*.

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v.  
OWEN.

The costs incurred since that date have been occasioned entirely by the plaintiff; and we have an authority in the case of *James v. Raggett* (a), for ordering the plaintiff to pay such costs. The defendant, however, is not without blame; it was his duty to have served the rule of Court immediately, and to have brought it before the attention of the learned Baron, on the 22nd *February*, when the summons was heard. I therefore think that the justice of the case will be best answered by setting aside the verdict and staying all further proceedings, the plaintiff to pay to the defendant the costs incurred after the 8th *March*, and the plaintiff to have from the defendant the costs up to that time.

The other Barons concurred, and the rule was drawn up accordingly.

(a) 2 B. & A. 776.

#### FIELD v. COPE.

If the execution creditor does not appear upon a rule to relieve the sheriff under the Interpleader Act, the Court will order the sheriff to withdraw from possession, but will not direct the execution creditor to pay the sheriff the costs of keeping possession.

THE plaintiff, having obtained judgment against the defendant, sued out a *fi. fa.*, which he delivered to the sheriff who seized the defendant's goods, but, before they were sold, received a claim from the assignees of the defendant, against whom a fiat had issued. He continued in possession of the goods, and applied for relief under the stat. 1 & 2 *W.* 4, c. 58, s. 6, calling before the Court the plaintiff and the assignees to state their claims.

*Richards* appeared for the assignees, and suggested that the plaintiff had proved his debt against the defendant in bankruptcy.

The plaintiff did not appear, whereupon the rule was enlarged; and *Whitmore*, for the sheriff, obtained a further rule for the sheriff to be at liberty to withdraw from the possession of the goods.

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1832.

FIELD  
v.  
COPE.

Both rules came on together, and the plaintiff still not appearing, *Whitmore* contended that the defendant's assignees should pay the sheriff the costs incurred by him since the notice was given by them.

But the Court said it was not the practice to give costs to the sheriff, who applied for an indulgence, and to be relieved from a liability cast upon him by law. And as the plaintiff did not appear, the first rule was discharged, but the second made—

Absolute (a).

(a) See *Bowdler v. Smith*, 1 Dowl. P. C. 417, and *Parker v. Booth*, 8 Bing. 85.

#### DOE d. WOODHEAD v. FALLOWS and Others.

**T**HIS was an ejectment by a mortgagee against the defendants, one of whom was the widow and administratrix, and the others the children of *Joseph Fallows*, who, at the time of his death, was possessed of a lease of the premises in question, for the residue of a term of ninety-nine years. After his decease, by an indenture of mortgage, the widow and administratrix, in consideration of the sum of 300*l.*, which was therein expressed to be to her in hand well and truly paid by the lessor of the plaintiff, at or before the sealing and delivery of the said indenture of mortgage, assigned the lease to the lessor of the plaintiff

An administratrix, being indebted to an attorney for rent, executed to him a mortgage of leasehold property belonging to her intestate, which falsely recited that 300*l.* was paid as a consideration; the next of kin, not knowing the facts, were induced, by misrepresentation, to execute the mortgage; and

the jury at the trial found that the deed had not been fairly obtained:—*Held*, that the mortgagee was not entitled to recover in ejectment against the next of kin, because of the fraud, nor against the administratrix, who was the widow of the intestate, because the accounts of the estate had not been wound up.

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1832.

DOE  
vs.  
WOODHEAD  
vs.  
FALLOWS.

for the residue of the term; and the other defendants joined in the execution thereof.

At the trial before *Bolland, B.*, at the Summer Assizes at *Chester*, 1831, it appeared that the sum of 300*l.* secured by the mortgage, was a sum due from the widow to the lessor of the plaintiff in her own right, and not as administratrix. It also appeared that the children had been induced by misrepresentation to execute the assignment; and a letter was produced from the lessor of the plaintiff to one of the children (who was not a defendant in this ejectment), requesting him to execute the deed, and apprising him that the mortgage was to secure the payment of a bill of costs due from the widow to the lessor of the plaintiff, as attorney, and assuring him at the same time, that the deed would not be enforced against him. *John Evans*, for the defendants, insisted that the whole transaction was a fraud, and that the children had been induced by this letter to execute the assignment, and that the deed was therefore void in law. *Bolland, B.*, left it to the jury to say whether, in their opinion, the execution of the deed had been fairly obtained; upon which they found a verdict for the defendants.

*Lloyd*, in *Michaelmas Term*, obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, against which

*John Evans* shewed cause, and cited *Scott v. Tyler* (a), *Hill v. Simpson* (b), *Nugent v. Gifford* (c), and *M'Leod v. Drummond* (d), and contended that the transaction, being bottomed in fraud, was void.

*Lloyd, contra*, insisted that though the defendants might

(a) 2 Bro. C. C. 431; 2 Dickens, 712.  
(b) 7 Ves. 152.

(c) 1 Atk. 463.  
(d) 14 Ves. 353; 17 Id. 152.

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DOE  
d.  
WOODHEAD  
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vitiates the transac-  
tion is ineffectua-  
l doctrine of Lord  
may be collected  
from *Grose in Farr* v

It is the duty  
of a due course of  
law to him if he does  
that breach in  
dependence in this  
and was the  
the lessor of  
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HARRIS v. ALCOCK.

A defendant having been arrested in the country, and bailed, was declared a bankrupt, and allowed until after the time for rendering him to pass his final examination; the Court enlarged the time to render until four days after the final examination of the bankrupt, but required an affidavit that it would be inconvenient for the commissioners to attend at the county gaol or in London, to take the bankrupt's final examination.

THE defendant in this case, who resided in *Birmingham*, having been arrested upon a *quo minus copias*, and bailed, was declared a bankrupt, upon a commission issued to certain parties residing at *Birmingham*, at which place the commission was opened on the 12th *January*. The defendant surrendered, and was allowed time to pass his examination, and the last sitting was fixed for the 24th of *February*, 1832.

*Thesiger*, on behalf of the creditors, moved, upon an affidavit stating these facts and that the bail could and would render the defendant in their discharge unless the application was granted, for a rule to shew cause why they should not have time to render until a week after the defendant should have passed his final examination, with a stay of proceedings in the meantime. He urged that the estate of the bankrupt would be put to great expense if the bankrupt were rendered, and the commissioners obliged to come to town to take his final examination; and relied on *Crump v. Taylor* (a), *Mauds v. Jowett* (b), and *Glendining v. Robinson* (c), as authorities for similar applications under the statutes then in force.

BAYLEY, B., (the only Judge in Court), observed, that the decisions relied on, were pronounced before the stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 21, which allows a render to the gaol of the county, in which the defendant is arrested, and directed the case to stand over, to see if it were inconvenient for the commissioners to attend at *Warwick* or *London*, to take the bankrupt's examination.

Subsequently, *Thesiger* produced an affidavit that it

(a) 1 Price, 74.

(b) 3 East, 145.

(c) 1 Taunt. 320.

Reasonable costs of serving a notice of taxation will be allowed, and if the defendant resides in the country, and has not employed an attorney, an attorney in the country may be employed to serve him with a notice of taxing costs.

THE defendant in this case gave a *cognovit* after process had been issued, without appearing or employing an attorney. Upon this, the plaintiff signed judgment, and on the 5th of *May* sent a letter to an attorney at *Exeter*, inclosing a notice to tax costs, to be served on the defendant. The defendant had at that time left his former residence; and in consequence the notice was sent on the 7th to an attorney at *Torrington*, who served the defendant four or five miles from that place, and charged for so doing (including postage, journey, horse-hire, and letter to plaintiff's agent) 1*l.* 12*s.* Upon taxation, the Master disallowed that charge, considering that the notice might have been sent by the post, and allowed only for the postage of a letter to *Exeter*, upon the principle of a notice by letter being sufficient.

*Kelly* now moved to review the taxation, and submitted this as an important question upon the construction of the rule T. T. 1 *Will.* 4, though trifling in amount. He urged, that the service by letter would be open to fraud; and that, if it was intended that the party should *bona fide* have notice of the taxation, the only way of serving it was to send the notice to an attorney in the country, who must be paid for his trouble in serving the party.

BAYLEY, B., thought that notice of the taxation of costs was of such importance to the party concerned, that the Master should allow a reasonable sum for giving that notice in a mode which would afford him an opportunity of attending the taxation, should he think fit; and the Court referred the bill to the Master to review his taxation, and allow a reasonable sum under the circumstances of the case.

past; the absence of which latter statement was the ground of the decision in *Jackson v. Yate*.

But the motion on the 28th *April* came too late, for two further steps had been previously taken by the plaintiff. The writ being returnable on the first day of term, the time for putting in bail expired on the fifth day of term, this being a town cause. *D'Argent v. Vivant* (a). On the 16th a declaration was filed, and the sheriff ruled to return the writ; on the 26th, he was ruled to bring in the body, and a rule for an attachment has since been obtained against him.

*Godson, contra*.—The case of *Buckworth v. Levy* (b) is a decisive authority on the first point. But it is said, that the motion comes too late on behalf of the bail, the defendant having absconded to *Holland*. The sheriff had four days from the first day of term to return the writ. Then till bail above are put in, they can have no opportunity of knowing the contents of the affidavit on which the arrest took place. Four other days of business, commencing with the 20th (*Good Friday*) and ending with the 24th, must also be deducted.

BAYLEY, B.—The application is too late. It is immaterial when the sheriff would be compellable to return the writ; for this being a town cause, the defendant ought to have put in special bail within four days exclusive after the return of the writ; and had he proceeded promptly to do so, this application would have been too late, even if, (throwing out of consideration the four days), it had been made on the 25th. The defendant is identified with the bail below, who are interested in putting in and perfecting bail above in due time. The interval between the first and fifth days of the term was the period within which the

(a) 1 East, 330.

(b) 7 Bing. 251.

correctness of the affidavit to hold to bail should have been inquired into, in order to ascertain whether or not bail above should be put in. Had this motion been made within that time, the plaintiff by discontinuing might have saved costs and issued a new writ; whereas, if this rule were to be made absolute, he would be left in a worse con-

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1835  
TUCKER  
v.  
COLEMAN

or other proceedings, except notices of trial and notices of inquiry, in any of the Courts of law at *Westminster*.

(Signed by the Judges of the three courts  
of common law.)

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## MEMORANDA.

IN the vacation after *Hilary* Term, Mr. Baron *Garrow* resigned his seat in this Court.

*John Gurney*, Esq., K. C. and *John Taylor Coleridge*, Esq., were called to the degree of the coif, and gave rings with the following motto:—*Justo secernere iniquum*.

*John Gurney*, Esq., succeeded Mr. Baron *Garrow*, and took the oaths and his seat in this Court on the second day of *Easter* Term. He was afterwards knighted.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

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TRINITY TERM, 2 WILL. IV.

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The ATTORNEY-GENERAL v. RIDDLE.

Revenue,  
1832.

**THIS** was an information against the defendant, a paper-maker, for selling, sending out, and delivering paper not tied up and labelled, and for removing paper from his manufactory not inclosed in a wrapper so labelled, and with such impressions of a departure stamp thereon as are required by the stat. 1 *Geo.* 4, c. 58, ss. 6 and 7.

At the trial, before the Lord Chief Baron at the sittings after last *Michaelmas* Term, it was proved, that, on the day laid in the information, the defendant's wife went with her brother-in-law in a cart to the shop of *Shering*, a grocer at *Halstead*. The man went in, and in her name solicited a loan of 5*l.* to make up 50*l.* then due from her husband, the defendant, for paper duty; adding, that she would deposit with him paper worth 6*l.* which was then in the cart. *Shering* came to the cart, and she repeated the same

A wife, who was proved to have authority from her husband, a paper-maker, to do certain acts in his trade, pledged paper which had no wrapper, label, or departure stamp on it; the Chief Baron was of opinion at the trial that the husband was not liable for this act of his wife, but the Court, upon motion, held that the authority of the wife was a question for the jury.

thing to him, saying, if the money was not forthcoming he might keep the paper. The bundle of paper had no wrapper or label, and no departure or duty stamp on it, both of which stamps are on the label, and put on by the officer charging the duty. *Shering* took the paper and gave her a cheque for 5*l.*, for which she got cash, and on the same day 'paid 5*l.* for paper duty then due, 45*l.* having been paid before. Her brother-in-law was in the house with her when she paid the duty. The money was not repaid, and *Shering* kept the paper, which was seized on his premises. It was proved that the defendant was an entered paper-maker, and that the course of the trade was for the surveying officer, on receiving notice from the paper-maker to attend to weigh and charge the duty, to take the stamp denoting the charge of duty in order to apply it to part of the label fixed on the top of the wrapper; and that, before sending out paper from the stock, it was the duty of the maker to tie it up and affix an impression of another stamp, called a departure stamp, on that part of the label fixed to the side of the wrapper, in order to denote the time of its leaving the maker's possession. The wife, in the absence of her husband, sometimes wrote the notices to charge and weigh; but, when applied to by the officers, the foreman always referred to his mistress. She also had paid paper duty to the collector more than once. After the seizure, the defendant was asked "whether he allowed his wife to transact business for him in his absence, such as giving notices and the like;" and he said, "I do." She never gave directions as to the mode of carrying on the business, nor did any thing except giving the notices to charge if her husband was absent. When the defendant was at home, he always gave the requisite notices, but was often absent from home. Eighteen notices to weigh and charge, signed "*Ann*, for *William Riddle*;" fourteen receipts for labels, signed by her, and one account of goods sent out since the last survey

*Revenue,*  
1832.  
ATT.-GEN.  
v.  
RIDDLE.

the master has been made answerable for the act of his servant it has been proved that the servant acted in the course of the manufacture, from which the master's authority might be inferred.

The *Attorney-General, Clarke* and Sir George Grey, *contra*.—The *Attorney-General v. Siddon* is in point. The master, in that case, knew nothing of the act of the servant; yet, as, with his master's authority, he was engaged in an illegal trade, the master was held responsible for acts done in the prosecution of that illegal traffic. The wife is a mere agent. This is not a criminal proceeding; but cases purely criminal have gone farther than here contended for. In *Rex v. Gutch (a)*, the proprietor of a newspaper, though residing at a distance, and not proved to take any part in its management, or to know of the libellous publication, was held criminally responsible for the act of the managing partner, who conducted the paper for him. Such also is the principle of *Rex v. Almon (b)*, and *Rex v. Dixon (c)*. The evidence was fairly calculated to raise the inference, that the wife had a general authority from the defendant to conduct his business in all respects in his absence, and the question should have been left to the jury. The circumstance of the wife being also liable does not affect the admissibility of the evidence.

*Cur. adv. vult.*

LORD LYNDHURST, C. B.—The ground of the motion for a new trial was the rejection of evidence, which, it was contended, ought to have been received. The facts of the case were these:—The defendant was a paper manufacturer, who employed a foreman to superintend the manufacture of the paper. During the absence of the defendant his wife acted for him in one department of the busi-

(a) Mood. & Malk. 437.  
(b) 5 Burr. 2686.

(c) 3 M. & S. 11; 4 Camp. 12,  
S. C.

ness. It appeared upon the evidence, that in cases where notices were necessary for the excise officer, these notices, during the absence of the husband, were very frequently given by the wife. It does not appear that she interfered in the manufacture of the paper, but, during the absence of the husband, she was exclusively employed in that part of the business referred to, and so much so, that the foreman used to appeal to her to know what notices should be given. It appeared also, that, on one occasion, she was employed by the defendant to pay duty in arrear; and on another, that she pledged some paper from her husband's manufactory to raise the money to pay the duties.

These were the general facts of the case, and under these circumstances it was proposed by the *Attorney-General* to give certain acts of the wife in evidence, in order to fix the husband with the improper removal of paper. It was stated that, some duties being in arrear, the wife had called at the house or shop of a neighbour, with a quantity of paper which had been illegally removed from the manufactory, and that she was desirous of borrowing money upon the deposit of it. The money was lent, and the paper accordingly deposited, and it was stated by the *Attorney-General* that he should prove that on the same day the duties then due were paid by the wife. That evidence was rejected, as not being evidence proper to charge the husband with the acts of the wife; but we are of opinion that it was improperly rejected, and that it ought to have been left to go to the jury to decide whether or not the act of the wife, under the circumstances stated, was done by the authority of her husband, the defendant. Therefore there ought to be a new trial.

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Rule absolute.

The rule H. T. 2 Will. 4, s. 74, is prospective, and applies to all taxations after the commencement of Easter Term.

Where the general issue is pleaded to a declaration containing several counts, it tenders a distinct issue upon each count; and, upon taxation, the defendant under the R. H. 2 W. 4, s. 74, is entitled to the costs of those counts found for him.

**I**N case, the declaration contained eighteen counts, nine for a malicious prosecution, and nine for ~~stealer~~ (a). At the trial the jury found for the plaintiff on the tenth, eleventh, and twelfth counts, damages 40s.; and for the defendant on the residue of the declaration. Upon the taxation of costs, the Master allowed the plaintiff his costs on the three counts found for him, but refused to allow the plaintiff his costs on the other counts, and did not deduct from the plaintiff's costs the costs of those issues found for him.

*Crowder* obtained a rule to shew cause, why the Master should not review his taxation, and relied upon the rule H. T. 2 Will. 4, s. 74.

*Erle* shewed cause.—The rule draws a distinction between counts and issues, and nothing is said except as to costs of issues actually found for the defendant. Not guilty is one issue, and one issue was raised at the trial. The new rule introduces a new practice; for, formerly, if there were several issues, the defendant was not allowed the costs of the issues found for him.

[*Bayley, B.*—There is in substance an issue upon each count, the same as if the defendant had pleaded separately to each count, Not guilty.]

But the rule of Court is not prospective, and did not take effect till the first day of this term.

*Crowder, contra.*—The rule was framed to meet the evil which existed under the old practice; and the plea tenders an issue upon each count. If it were otherwise, several

(a) *Ante*, p. 362.

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of *Easter* Term last. The Court of *King's Bench* agrees with us in this construction of the rule; and the Court of *Common Pleas* does not differ, although it is not so strongly of that opinion as this Court and the Court of *King's Bench*.

Rule absolute.

*Equity.*

THE ATTORNEY-GENERAL on the relation of CRUPPER and Others v. MALIN and Others.

A solicitor of the Court of *Chancery*, not admitted in the equity *Exchequer*, may practise in the Equity *Exchequer* in the name of a sworn clerk of the Remembrancer's Office, and is entitled to his fees.

THE relators filed a bill in the *Exchequer* in equity, and employed for that purpose a solicitor of the Court of *Chancery*, not admitted as a solicitor in the Court of the *Exchequer* in equity, who acted in the name of a clerk in court of the King's Remembrancer. An order having been made for the defendant to pay to the relators their costs on taking the answer off the file, the Master taxed the costs as between party and party, and allowed the solicitor his fees; which, being charged in gross, were afterwards divided between the solicitor and the clerk in court. The defendants excepted to the Master's report, and contended, that the solicitor was not entitled to fees; and the Chief Baron referred the question to the full Court.

The affidavits stated, that, by the practice of the King's Remembrancer's Office, it was not necessary that a solicitor of *Chancery* should be admitted in the *Exchequer* in equity to enable him to practise there in the name of a clerk in court; that a roll of admissions was kept in the office of the Remembrancer, from the year 1729, in which year there were forty-six admissions; in the following year, about one thousand three hundred and sixty admissions (the stat. 2 *Geo.* 2, c. 23, passed in that year); from 1731 to 1793, about one hundred admissions; in 1794, about seven hundred admissions; and from that time to

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that, from the earliest period, all business had been conducted in the name of the sworn clerks of the different offices of the *Exchequer* (a), who were the only recognised officers of the Court; and that the stat. 2 Geo. 2, c. 23, s. 27, applied equally to every department of the Court; and, as no instance could be shewn of attornies being admitted, and practising in their own names, on the plea side, or in the Treasurer's or Pipe Office, it followed that the same privilege existed in that of the King's Remembrancer. They also relied on the judgment in *Meddowcroft v. Holbrook*.

LORD LYNTHURST, C. B.—This question is of importance to solicitors in the Court of *Chancery*, who have practised in the Court of equity in the *Exchequer Chamber*, without being admitted as solicitors in that Court. When it came before me at *Gray's Inn Hall*, on exceptions to the Master's report, I did not sufficiently advert to sect. 27 of 2 Geo. 2, c. 23, and considered myself bound by the case of *Vincent v. Holt*. However, I had so much doubt on the construction of the act, that I suggested the propriety of taking the opinion of the whole Court upon it. It has now been argued before us with considerable learning, and after elaborate researches on both sides. Looking at the stat. 2 Geo. 2, c. 23, independently of the 27th section, I entertain considerable doubts whether the decision of Lord *Loughborough*, in *Meddowcroft v. Holbrook*, was not correct. The clauses relating to the admission and enrolment of *attornies* are the same as those which relate to the admission and enrolment of *solicitors*; but in the 10th section it is provided, that an attorney sworn, admitted, and enrolled as such, in any of the superior Courts of common law at *Westminster, Wales*, or the counties palatine, may, by consent in writing of another

(a) 2 Man. Pract. 195; Vin. Warren, Cro. Car. 159; *Keilway's* Abr. "Atty." (K. 2); *Thursby v.* case, March. Rep. 78.

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admitted in the Court of *Exchequer*, but not for attornies of that Court; and the 27th sect. provides for the enrolment of the attornies or clerks of the offices of the *Exchequer* therein mentioned, according to the ancient custom of the Court. That section is not applicable to attornies or clerks of certain offices in the *Exchequer*, among others, the office of the King's Remembrancer. What then are the officers of the King's Remembrancer? They are the sworn and side clerks, who execute the equity and revenue business. These persons are not admitted and enrolled according to 2 *Geo. 2*, c. 23, but in the manner accustomed before that act. So likewise were the attornies or clerks of the office of Pleas of the Court of *Exchequer*, before 11 *Geo. 4* & 1 *Will. 4*, c. 70. These attornies and clerks may, by the stat. 2 *Geo. 2*, c. 23, s. 27, practise in other Courts in the names and with the consent in writing of the attornies of such other Courts; and by the concluding words of the section, which are material expressions in this case, it is enacted, that it shall be lawful, from and after the 1st *December*, 1730, for any person who shall be sworn, admitted, and enrolled an attorney or solicitor in any of the several Courts before mentioned, according to the direction of this act, to practise and solicit in the said *respective offices* in the same manner as heretofore has been done, any thing hereinbefore contained, or any law or statute to the contrary, notwithstanding. This enactment applies to the office of Pleas, and the office of the King's Remembrancer. We know that attornies of other Courts practised before the late statute in the office of Pleas, in the names of the attornies of the Court. Such is the construction put upon this section by practice, and nothing is produced to the contrary. What then has been the usage in the King's Remembrancer's office? The equity and revenue business is conducted there by sworn attornies, and many attornies practise in their names. Such has been the constant usage; and our decision is warrant-

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sought to set off 3*l.* 17*s.* for a stove sold, and for work and labour. The cause was tried before *Gaselee, J.*, at the *Somerset* Lent Assizes, when the jury, there being conflicting evidence as to the value of the work, found for the plaintiff with 4*l.* 10*s.* damages, upon an understanding that the defendant was to take back his stove.

The plaintiff and his witnesses resided at *Frome*, in *Somersetshire*, where the work was done for which the action was brought; and the defendant, when the debt was contracted and the action brought, lived at *Bradford*, within the jurisdiction of the *Bradford* Court of Requests, and might have been summoned before the said Court.—*Frome* is out of the jurisdiction of that Court.

The statute 3 *Geo. 3*, c. xix., intituled "An Act for the more easy and speedy recovery of small debts, within the

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applied for the defendant's costs; and, there being a difficulty as to the form of the application, the act being silent on the subject, mentioned the distinction which was taken in the case of *Lawson v. Moggridge* (a), and urged that a suggestion was necessary to entitle a defendant to costs, whereas the plaintiff may be deprived of his costs by motion only.

*Bayley, B.*, adopted this distinction, and observed, that the best course would be for the defendant to have a rule to shew cause why a suggestion should not be entered on the roll to entitle the defendant to the benefit of the statute; and the rule being drawn up accordingly—

*Bompas, Serjt.*, and *Erie*, shewed cause.—The manifest inconvenience which would ensue were plaintiffs compellable to sue in local courts, and to bring their witnesses from any distance, however great, will naturally induce the Court to construe such statutes strictly. The original demand in this case exceeded 5*l.*, although the debt really due was ascertained to be below that sum. This distinction is material in considering this question, and is recognised by the statute which ascertains the jurisdiction of the Court, not by the amount ultimately recovered, but by the sum in dispute between the parties. An authority to sue in this Court is only given by the 18th section to such persons as claim or demand a sum not exceeding 5*l.*; and if the plaintiff really supposed, though erroneously, that he was entitled to more than that amount, he could not sue in this local court without abandoning a portion of what he deemed to be a just demand. In actions for work and labour, the amount claimed may be reduced by the jury, without any imputation upon the fairness of the plaintiff's demand; and the real criterion should be, whether the plaintiff had a reasonable

(a) 1 Taunt. 396.

and probable cause to litigate such a demand. *Harsant v. Larkin* (a). This distinction was taken by Lord *Ellenborough* in *Horn v. Hughes* (b); who observed, that if the plaintiff had failed from the absence of a material witness or other cause, without his default, the Court would not interfere. In these cases, the acts mentioned debts only, and did not, as in this case, draw the distinction between a debt and a claim. Where the debt is ascertained, for instance, where a balance is struck, the plaintiff has no *bond fide* ground for claiming more, and the Court would interfere. So, if a portion of a claim be barred by the Statute of Limitations, it is legally at an end, and the plaintiff has no ground for making any demand in respect of it. *Shaddick v. Bennett* (c). But, if the finding of the jury be the only ground upon which the Court will act, it was superfluous for the statute to require a certificate of the judge that the debt ought to have been recovered in the local court, for the *postea* would ascertain the sum awarded; and in no case ought the Court to enter into extrinsic evidence.

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The mere hardship consequent upon the expense of bringing witnesses from any possible distance, is not the only injurious effect which must result from a strict construction of this statute. It may be attended with a complete failure of justice. The statutes give no compulsory process to summon witnesses who live out of the jurisdiction; and the consequence will be, that a debtor within the jurisdiction may with impunity defy a creditor, whose only witness may be hostile, and reside beyond the limits of the jurisdiction of the Court.

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*Wilsby (a)* and *Shaddick v. Bennett*, and had submitted that the only mode of preventing a fictitious claim to oust the Court of its jurisdiction, was to take the amount of the damages as the only estimate of the amount of the debt which ought to have been demanded.

LORD LYNTHURST, C. B.—This rule ought to be made absolute. The hardship which must necessarily result from this and similar statutes to plaintiffs who reside at a distance, and can only prove their debts by witnesses who are out of the jurisdiction, and, therefore, not amenable to the process of the local courts, has always formed a prominent feature in arguments upon such questions. It was much pressed upon this Court in the case of *Graham v. Browne (b)*, and was there disposed of. There the defendant resided within the jurisdiction of the *Bath* Court of Requests, and the plaintiff and his witnesses lived in *London*. At first, we were disposed to admit the force of the argument against the exercise of a discretionary power, and inclined against the entry of a suggestion which might tend to defeat the ends of justice. However, we felt ourselves imperatively bound by the words of the statute, and the suggestion was entered. The same argument was pressed upon the Court of *King's Bench* in the case of *Baildon v. Pitter (c)*, but the Judges of that Court considered themselves to be concluded by the words of the statute there relied on, and in like manner ordered a suggestion to be entered. The words of this statute are not essentially dissimilar from those which were relied upon in the cases to which I have alluded, and must receive a similar construction.

If, after a verdict has been delivered for less than 5*l.*, it

(a) 6 Taunt. 452; 2 Marsh. 145.

(b) 2 Cr. & Jerv. 327.

(c) 3 B. & A. 210.



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*Prima facie*, the verdict of a jury is the estimate of what is the just debt due between the parties at the period when the action was commenced. I agree with the Lord Chief Baron, that the meaning of the word "demand" in the statute is rightful demand; and, the amount of the debt here being ascertained by the jury to be below 5*l.*, that sum, and that sum only, could rightfully be demanded by the plaintiff from the defendant. If the Court could exercise a discretionary power in ordinary cases of this kind, this is not, in my opinion, a case in which such a discretionary power ought to be exercised. In *Harsant v. Larkin*, Mr. Justice Richardson relied upon a particular provision in the *Rochester Act*, which differed that case from all other cases. The thirteenth section excluded from the jurisdiction of the Court of Requests all claims which were not for the payment of a sum certain, and all debts being the balance of an account originally exceeding 5*l.* In that case, and also in *Horn v. Hughes*, the sums originally due to the respective plaintiffs were above the sums recoverable in the local courts, but had been reduced by payments on account below that sum.

BOLLAND, B.—The case of *Harsant v. Larkin*, proceeded upon the very particular circumstances of that case; and our present judgment will no way trench upon that decision.

GURNEY, B., concurred.

Rule absolute

*Ex parte* JONES and Others, in the matter of WILLIAM RICHARDSON, a Bankrupt.

*Exch. of Pl*  
1832.

THE Lord Chancellor sent the following case for the opinion of this Court:—

*William Richardson*, a bankrupt, was, at and before the date and execution of the several bills of sale herein-after mentioned, sole owner of a ship or vessel called the *Lady East*, and of a schooner or vessel called the *Sprightly*, and was also the owner of  $\frac{1}{12}$  parts or shares of and in a ship or vessel called the *Pyramus*; all which several vessels belonged to and were registered at the port of *London*.

On the 10th *June*, 1830, the said *William Richardson* executed a bill of sale by way of mortgage of the said ships or vessels called the *Lady East* and *Sprightly*, and of his said  $\frac{1}{12}$  parts or shares of and in the said ship or vessel called the *Pyramus*, to *Edward Whitmore, John Wells, John Wells the younger, and Frederick Whitmore*, of *Lombard Street*, in the city of *London*, bankers, for securing the sum of 6,500*l.* and interest; which said bill of sale contained an assignment of the part, share, and proportion of the said *William Richardson* of and in the respective freights then earning or to be earned by the said vessels respectively, together with certain policies of assurance effected on the said ships or vessels respectively, and powers of sale of the said ships or vessels, parts or shares of ships or vessels and premises. The said three vessels were, at the date of the said bill of sale, at sea.

On the 10th *June*, 1830, *W. R.* mortgaged by bill of sale to *W. & Co.*, the ships *Lady East, Pyramus* and *Sprightly*, then being at sea. The bill of sale contained an assignment of the freight and policies. On the 12th *June*, the said bill of sale was entered in the book of registry. On the 18th *October* the *Sprightly* returned to port, and sailed again on the 16th *November*. On the 7th *Jan.*, 1831, *W. R.* mortgaged the same ships, freights, and policies to the petitioners by bill of sale, containing a recital of and subject to the first mortgage; on the 11th *May*, 1831, the said second bill of sale was entered in the book of registry; on the 14th *June*, *W. R.* be-

came bankrupt; on the same day, the *Pyramus* arrived from sea; and on the 15th *July*, the *Lady East* arrived from sea; on the 21st *June*, both mortgages were indorsed on the certificate of the *Pyramus*; and, on the 16th *July*, both mortgages were indorsed on the certificate of the *Lady East*. The *Pyramus* was lost at sea:—*Held*, that the second mortgage was valid as to the interest in the ships, freights, and policies.

*Semble*, that a bill of sale, purporting to be a second mortgage of a ship, is not such a transfer of the same interest in a ship within the 39th section of the 6 *Geo.* 4, c. 110, as requires the thirty days mentioned in that clause to elapse before the officers can enter such a second mortgage in the book of registry; that clause applying to the case of instruments under which there may be conflicting claims, and not to the case of a second mortgage consistent with, and subject to, the first.

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On the 12th *June*, 1830, the said bill of sale was produced to the officers of the customs, at the *Custom House* of the port of *London*, and the particulars thereof were entered in the book of registry of each of the said three vessels. The said schooner or vessel called the *Sprightly*, returned to the port of *London* on or about the 18th *October*, 1830; and sailed again, on a voyage to the *Canary Islands*, on or about the 16th day of the following month of *November*. No indorsement of the said bill of sale, from the said *William Richardson* to the said Messrs. *Whitmore & Co.*, was made on the certificate of register of the said vessel called the *Sprightly*, during her stay at the port of *London*, or at any other time, nor was the said certificate produced to the officers of the customs for the purpose of having such indorsement made thereon.

By an indenture or bill of sale, bearing date the 7th *January*, 1831, and made between the said *William Richardson*, of the first part; *Samuel Brent Cock*, therein described, of the second part; the petitioners, of the third part; and the said *Edward Whitmore*, *John Wells*, *John Wells* the younger, and *Frederick Whitmore*, of the fourth part; after reciting the respective certificates of registry of the three several ships or vessels, and the said mortgage to Messrs. *Whitmore & Co.*, of the 10th day of *June*, 1830, the said *William Richardson* did assign and transfer to the petitioners the said vessels called the *Lady East* and the *Sprightly*, and his said  $\frac{1}{4}$  parts or shares of and in the said vessel called the *Pyramus*, together with two several policies of assurance effected on the said ship *Lady East*; a policy of assurance for 800*l.* effected on the said ship *Sprightly*; and a policy of assurance for 1,000*l.* effected on the part or share of the said *William Richardson* of and in the said ship *Pyramus*; and a certain sum of 6415*l.* 4*s.*, or so much thereof as should become payable for the hire of the said ship *Lady East*, under a certain charter-party of affreightment therein recited, where-

by the said ship *Lady East* was let to freight to the *East India Company*, for a voyage to *Fort William*, in *Bengal*, and back again to *London*; and all other monies payable to the said *William Richardson* under the said charter-party; and all the right, title, and equity of redemption of the said *William Richardson* of and in the said ships, freight, monies, and policies; subject, nevertheless, to the said prior mortgage to the said *Edward Whitmore*, *John Wells*, *John Wells* the younger, and *Frederick Whitmore*, for the securing the payment to the petitioners of seven bills of exchange for the several sums of 632*l.*, 353*l.* 4*s.* 4*d.*, 193*l.* 1*s.*, 295*l.* 2*s.* 8*d.*, 405*l.* 10*s.* 4*d.*, 511*l.* 10*d.*, and 609*l.* 1*s.*, and dated respectively 30th *November*, 8th *December*, 7th *December*, 11th *December*, 18th *December*, 15th *December*, and 25th *December*, 1830; drawn upon the said *William Richardson* by the said *Samuel Brent Cock*, payable to the said *Samuel Brent Cock* or his order, and by him indorsed to the petitioners on or about the 7th day of *January*; which bills of exchange amounted in all to the sum of 2999*l.* 2*d.*, and were so indorsed to the petitioners in substitution for a renewal of seven other bills of exchange then over due, amounting to the sum of 2950*l.* 9*s.* 2*d.*, with the interest and stamp duty thereon; and the said last-mentioned bills of exchange were drawn by the said *Samuel Brent Cock* upon and accepted by the said *William Richardson* for the accommodation of the said *Samuel Brent Cock*, and by the said *Samuel Brent Cock* indorsed to the petitioners in payment for goods sold and delivered by the petitioners to the said *Samuel Brent Cock*, to the full amount thereof; and in the said bill of sale are contained covenants from the petitioners to the said Messrs. *Whitmore & Co.*, that it should be lawful for the latter to exercise their powers of sale without the consent or concurrence of the petitioners; and that the petitioners would join and concur with them in all proper and reason-

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able acts for assuring the said ships or vessels, and parts or shares of ships or vessels to the purchaser or purchasers, if required by him or them; and enter into all proper deeds and instruments to enable the said Messrs. *Whitmore & Co.* to receive the said freights, and all sums to become due on either of the said policies; and the said last-mentioned bill of sale also contained a proviso and declaration that, after payment of the said sum of 6500*l.* and interest to the said Messrs. *Whitmore & Co.*, the surplus of such monies as should arise from the sale of the said ships or shares of ships, and from the receipt of any money in respect of freight, or under either of the said policies, should be subject and liable to the payment to the petitioners of the said several bills of exchange, amounting together to the sum of 2999*l.* 2*d.*

A counterpart of the said indenture was executed by the petitioners on the requisition of the solicitors of Messrs. *Whitmore & Co.*, and delivered to their said solicitors for their use.

On or about the 24th *January*, 1831, the petitioners caused a notice in writing of their said mortgage to be given by their solicitors to Messrs. *Whitmore & Co.*, in which they were required not to make any further advances on the security of their said mortgage.

On or about the 18th day of *January*, 1831, the petitioners caused notice in writing of the assignment to them of the sum of 6415*l.* 4*s.*, and other the freight and earnings of the said ship *Lady East*, payable, or to become payable by the *East India Company*, under the said charter-party of affreightment, subject to the said prior mortgage to Messrs. *Whitmore & Co.*, to be served on the said *East India Company*.

On several days between the 3rd and 7th days of *May*, 1831, inclusive, the petitioners caused notices to be served on the several underwriters, whose names were subscribed

to the said several policies of assurance; and on the *Indemnity Mutual Marine Insurance Company*, in whose office one of the said policies on the ship *Lady East* had been effected, of the assignment of the said several policies to the petitioners, subject to the said prior mortgage to the said Messrs. *Whitmore & Co.*

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On the 11th *May*, 1831, the petitioners caused their said bill of sale to be produced to the collector and comptroller of the customs of the port of *London*, and the same was entered in the book of registry of each of the said ships or vessels.

On the 14th *June*, 1831, the said *William Richardson* committed an act of bankruptcy; and a commission of bankrupt, under the great seal of the United Kingdom of *Great Britain and Ireland*, dated the 16th day of the same month of *June*, 1831, was duly issued against the said *William Richardson*, under which he was found and declared a bankrupt; the act of bankruptcy proved in support of the said commission having been committed on the 14th *June* last.

At the second public meeting under the said commission, holden on 5th *July*, 1831, *Charles Pearse Chapman*, of *Paul's Wharf, Thames Street*, in the city of *London*, merchant, and *Minshaw Glascott*, of *Gardner Street, Whitechapel*, in the county of *Middlesex*, copper merchant, were chosen assignees of the said bankrupt's estate and effects, and the usual assignment thereof was executed to them by the major part of the commissioners in the said commission named.

On or about the 14th *June*, 1831, the said ship *Pyramus* arrived in the port of *London*; and, on or about the 15th day of *July*, 1831, the said ship *Lady East* arrived in the said port of *London*. On or about the 21st *June*, 1831, the certificate of registry of the *Pyramus* was produced to the collector and comptroller of the customs in the port of *London*, and duly indorsed by them; first, with the particulars of the said bill of sale or mortgage to the said Messrs.

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*Whitmore & Co.*; and secondly, with the particulars of the bill of sale or mortgage to the petitioners. And on the 16th *July*, 1831, the certificate of registry of the *Lady East* was in like manner produced to the said collector and comptroller, and duly indorsed with the particulars of each of the said respective bills of sale.

The said vessel, called the *Sprightly*, has been totally lost by perils of the sea while proceeding on the voyage insured by the said policy for 800*l*.

The said vessel called the *Pyramus* has sustained damage upon the voyage insured by the said policy for 1000*l*., effected on the said *William Richardson's* interest therein as aforesaid; upon which policy an average loss has in consequence become payable.

The petitioners sought to have the deed of 7th *January*, 1831, established in their favour: this was opposed by the assignees of the bankrupt.

The questions for the opinion of the Court were—

1*st*. Whether the deed of 7th *January*, 1831, as far as the same relates to the interests in the ships, which that deed purports to assign to the petitioners, be void as against the assignees, by force of the ship registry act, 6 *Geo.* 4, c. 110, or not.

2*nd*. Whether the deed of 7th *January*, 1831, so far as relates to the policies of insurance and monies due from the *East India Company* therein mentioned, be void as against the assignees by force of the said ship registry act, 6 *Geo.* 4, c. 110, or not.

*Follett* appeared for the respondents, the assignees of the bankrupt, and contended, that, as he was to argue that the deed was void, in the affirmative of the question put by the Lord Chancellor, he had a right to begin. But the Court thought, that, as the matter arose out of a petition in bankruptcy, they ought to hear the parties in the same order in which they would have been heard before

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Now, that exception refers to the 39th section, and is explained by the declaration therein, "it being the true intent and meaning of this act, that the several purchasers and mortgagees of such ship or vessel, share or shares thereof, when more than one appear to claim the same property, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid." Now, here it is said that the 39th section was not complied with, because the officers entered the second mortgage in the registry before the thirty days had elapsed from the day in which the ships arrived in their port. The 39th section, however, was only intended to apply in the case of conflicting claims to the same property. It says—"That, when and after the particulars of any bill of sale, &c., by which any ship, &c., shall be transferred, shall have been so entered in the book of registry as aforesaid, the collector or comptroller shall not enter in the book of registry the particulars of any other bill of sale, or instrument purporting to be a transfer by the same vendor or mortgagor, or vendors or mortgagors, of the *same ship or vessel, share or shares thereof*, to any other person or persons, unless thirty days shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry; or *in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then unless thirty days shall have elapsed from the day on which the ship or vessel arrived at the port to which the same belonged.*" What is prohibited by this section to be done by the officers, is the entry of the same interest and property in a vessel which had been registered within thirty days, or which

had been registered whilst the ship was at sea, and the thirty days after her return had not elapsed. The intention to prevent conflicting claims to the same *property* would be clear, even if the latter part of the section had not expressly declared what was "the true intent and meaning thereof;" it gives each party making a claim to the same property, by a bill of sale, thirty days to register after the prior party has registered, or after a ship at sea has arrived. The words "same ship" must have the same meaning as the words same property in the latter part of the section, which are used directly after the words same ship, and shew that the Legislature meant by that expression the same thing—"the purchasers, &c., of the same ship, &c., when more than one appear to claim the same property." The expression *same ship*, in the beginning of the clause, is clearly intended to designate something more than the same wood and iron; it means the same interest, and not a conflicting interest. [*Bayley, B.*—You say that the two mortgages relate to a different subject matter; one to a ship free and clear; the other to a ship not free and clear, but mortgaged.] It is absurd to say that the mortgage of an equity of redemption is the same thing as the mortgage of an interest which is gone out of the mortgagor when he mortgages the equity of redemption. The interest is so far from conflicting, that both mortgages might well have been contained in the same deed. The second deed recited the first mortgage; and the officers did not, therefore, enter any inconsistent mortgages of the same interest. In construing such an act of Parliament, the Court must look at the spirit and intention of the act (a). Even supposing that the officer were wrong in making such entry, it does not follow that the instrument should be void between the parties.

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(a) *Watkins v. Lewis*, 1 Russ. 6 B. & C. 449; 9 D. & R. 503, & Mylne, 385; *Morris v. Milling*, S. C.

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The Legislature have not said that such a consequence shall follow. The registry is not a public book. The party does not know whether there has been any entry made by the prior party. It is the business of the officer to make the entries. Perhaps, in such a case, his duty would be to take a minute, and make the entry thirty days after the arrival of the ship. [Lord *Lyndhurst*.—It is not to be registered before a certain time. Suppose, by mistake, it is registered too soon, is there any thing in the act to prevent its being registered when the proper time arrives?] When the framers of this act intended to make the transfer invalid, they have said so, as in the 31st section; but in this part of the act they have made no such provision. Under the old acts, Lord *Eldon* (a) held that the clauses as to registry were directory, and that a defect in the form of registering did not make the sale void. That decision was cited and approved of in *Heath v. Hubbard* (b). In *Hodgson v. Brown* (c), a ship was registered at the port of *Newcastle*, and was transferred by a deed of assignment to owners resident in *London*, the ship being then in the port of *London*. The Court of *King's Bench* held that this transfer was not within the 34 *Geo. 3*, c. 68, s. 15, but within s. 16 of that act; and that the transfer was valid, although no indorsement was made on the certificate of registry. They held also, that the non-compliance with 7 & 8 *Will. 3*, c. 22, s. 21, did not avoid the transfer. In that case, though the positive requisitions of the statute of *Will. 3* were not complied with, yet it was held that the sale was not void. There is nothing in the late act to prohibit the petitioners from getting the entry made now. Why should they be in a worse situation, from the entry having been made already. It can never be contended, with success, that, if a ship is out at sea, the mortgagee or

(a) *Ratchford v. Meadows*, 3 Esp. 70. (b) 4 East, 110.

(c) 2 B. & A. 427.

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ject of the provisions, the rules and regulations must be strictly complied with. The positive regulations of the act are a much safer guide than speculations as to what the Legislature intended. [Lord *Lyndhurst*, C. B.—Suppose a party registers too soon, it is not valid and effectual, that is, until the time has elapsed. When that has elapsed, why may not the act of registration be effectual?] Before the thirty days from the arrival of the ship in port have elapsed, at the expiration of which time alone an effectual registry can be made, the right of a third person has intervened. [Lord *Lyndhurst*, C. B.—Only of a person representing the bankrupt. *Bayley*, B.—Suppose a man to contract by one bill of sale with many different parties, owners of a ship. The bill of sale goes to their different residences; and, before all have signed, one of the persons who has signed commits an act of bankruptcy, cannot the purchaser, by perfecting the registry, acquire a good title?] There would be nothing to prevent the property of the bankrupt from passing to his assignees. [*Bayley*, B.—The previous bargain would prevent it. The argument goes this length; that, if a person buys such property, he must stand the risk of the bankruptcy of any of the owners for thirty days.] By the very words and letters of the act, the bill of sale is not to be valid or effectual until registry. Here there is a second mortgage of the *same* property by the *same* person to another person the exact case provided for by the words of the 39th section, which prohibits the registry, which alone can make the bill of sale effectual, from being made until thirty days shall have elapsed from the return of the vessel. The registry made before that time is therefore of no avail, and the property cannot pass until the registry is duly made; before the time when such registry could be made, the bankruptcy occurred, the right of third parties intervened, and the property passed to the assignees.

*Secondly.* With respect to the supposed distinction be-

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ships, the requisites of the 31st clause only have been complied with, and not the requisites of the 37th and the 39th; that the right of third parties intervened before the time when the requisites of the act could be complied with, so as to take the property out of the bankrupt, and prevent its vesting in his assignees; that the assignees are entitled in preference to a party who has not complied with the provisions of the act, and that they are now entitled to the ships, subject to the first mortgage; that, as to the *Sprightly*, there is no distinction, or else injustice would be done to parties who would lose a portion of the time allowed to them by the act for completing their title; and that the freights and policies under the terms of the present ship-registry act stand in the same situation as the ships.

*Maule* was heard in reply.

The following certificate was afterwards sent:—

This case has been argued before us by counsel. We have considered it, and are of opinion, that the deed of the 7th *January*, 1831, is valid as to the interests in the ships, which that deed purports to assign; and as to the policies of assurance, and the monies due from the *East India Company* therein mentioned, as far as *choses in action* can be assigned.

LYNDHURST.

J. BAYLEY.

W. BOLLAND.

J. GURNEY.

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thereby make, ordain, depute, constitute, and appoint, and in his place and stead put, the said *Jane Bishop* his true and lawful attorney for him and in his name, for his use and on his behalf, at any time or times during the continuance of the said presents, when she his said wife, *Jane Bishop*, should see occasion or think proper, for him and in his name, amongst other things, to sell, mortgage, or otherwise assign, transfer, or dispose of, by way of security for any debt or demand owing by him, the ship or vessel *Star*, or any part thereof, of which he was, as therein and thereby alleged, sole owner, together with the tackle and other materials belonging thereto; and to sign, seal, and deliver bills of sale, assignments, and such other writings as should be necessary for perfecting the sale of, or mortgaging, or otherwise transferring the said vessel, and to give receipts and discharges for the money for which the said ship or vessel should be sold, mortgaged, or transferred, and to demand, levy, sue for, and recover of and from all persons whom it may concern all such sums of money as then were or should grow due to him, the said *James Bishop*, in respect of the said ship or vessel *Star*, for freight or otherwise; and to sign receipts or discharges for the same, and to freight, settle averages, and effect insurances, hire all masters, seamen, and other servants, and discharge them at pleasure, and do all other acts and things which she the said *Jane Bishop* should think proper and expedient in the management of his said ship or vessel *Star*, and all the appurtenances to the said ship or vessel belonging or appertaining; and generally to do all and every or any acts, deeds, matters, or things whatsoever in and about the estates, property, goods, merchandize, and affairs of him the said *James Bishop*, as amply and effectually to all intents and purposes as if he were personally present and did the same; he the said *James Bishop* thereby ratifying and confirming, and pro-

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mising and agreeing at all times to allow, ratify, and confirm all and whatsoever his said wife should lawfully do or cause to be done in and about the premises therein aforesaid by virtue thereof. On the 5th of *September*, 1826, she the said *Jane Bishop*, under and by virtue of the said hereinbefore mentioned power of attorney, so as herein aforesaid given to her, duly made and executed the said indenture so as hereinbefore mentioned, prepared with the consent of him the said *James Bishop*; and the same was an indenture drawn and made to bear date said 2nd day of *August*, 1826; and the same was made and expressed to be made by and between the said *James Bishop* of the one part, and the said plaintiff of the other part; and it was thereby recited, as the fact was, that the said *James Bishop* was then *the sole owner of the ship or vessel called the Star, belonging to the port of London*, at which port she stood duly registered pursuant to act of Parliament; and a copy of the certificate of such registry was stated in the said indenture: and by which indenture was further recited the said debt of 1379*l.* 6*s.* 6*d.*, and the said consent and agreement of the said *James Bishop* to give the said mortgage or security of the said ship or vessel by the said indenture. In pursuance of the said therein recited agreement, and for effectually *securing* to the said plaintiff *the said sum of 1379*l.* 6*s.* 6*d.**, with lawful interest thereon from thenceforth, and also in consideration of 10*s.*, he the said *James Bishop* granted, bargained, sold, assigned, transferred, and set over unto the said plaintiff, his executors, administrators, and assigns, all those full and undivided 64-64th parts or shares, being the entirety of and in the said ship or vessel called the *Star*, belonging to the port of *London*, and then lying in the *River Thames*, together with all and singular the masts, sails, sail-yards, anchors, cables, ropes, boats, bars, tackle, apparel, and furniture, and other appurtenances whatsoever to the said ship or vessel

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belonging, or in anywise appertaining, and every part and parcel thereof; and all the right, title, interest, benefit, claim, and demand whatsoever of him the said *James Bishop*, of, in, or to the said thereby assigned premises, and every or any part thereof: To have and to hold the said full and undivided 64-64th parts or shares or the entirety of and in the said ship or vessel, and all and singular other the premises thereinbefore described, and also bargained and assigned, or expressed or intended so to be, and every part and parcel thereof, with the appurtenances, unto the said plaintiff, his executors, administrators, and assigns at *any time and times thereafter, of his and their sole power and authority, and in his and their own discretion, without any* further concurrence by or on the part of the said *James Bishop*, his executors or administrators, *make sale* and absolutely dispose of the said ship or vessel, with her tackle, apparel, furniture, stores, and appurtenances, in such manner and way, and in such shares and proportions, and either by public auction or private contract, as he or they should think fit; with liberty, if he or they should think fit, to buy in the said assigned premises, or any part thereof, and resell the same at any future auction or by private contract, without being liable for any loss or diminution in price by such sale; and also *to assign* the same ship or vessel, with her tackle, apparel, furniture, stores, and appurtenances, when sold, unto the purchasers or purchaser thereof, and to his, her, or their executors, administrators, and assigns, or in such manner as the same person or persons should require or direct: and *upon this further trust*, that he the said plaintiff, his executors, administrators, and assigns, *should, out of the money to arise and be produced by freight or otherwise* from the said ship or vessel, which should be received by him or them, until such sale or sales as aforesaid should be made, and likewise out of the monies which

should arise from such sale or sales respectively as aforesaid, in the first place, deduct, retain, pay, and satisfy unto himself and themselves the costs, charges, and expenses of and attending the execution of the trusts thereby reposed in him, and them and the money which he or they should respectively disburse and pay, as well for the insurance of the said ship or vessel, her tackle, apparel, and furniture, as thereafter is mentioned, as in or about any suit or suits at law or in equity for obtaining the possession of the said ship or vessel and premises, or of any part thereof, and generally for carrying the trusts thereby reposed in him or them into execution, or enforcing the performance of any contract or contracts with any person or persons who should agree to become the purchaser or purchasers of the same ship and premises, or any part thereof; *and thereafter retain and pay unto himself and themselves, the said principal sum of 1379l. 6s. 6d., together with interest at the rate of 5l. for the 100l. by the year for the same, from thenceforth; and from and after payment and retainment, or other satisfaction of the principal money, interest, insurance, costs, charges, disbursements, and expenses aforesaid, then upon further trust that the said plaintiff, his executors, administrators, or assigns, should, at the request of the said James Bishop, his executors, administrators, or assigns, reassign and reassure the said ship or vessel, or so much and such parts or shares thereof as should remain unsold, unto the said James Bishop, his executors, administrators, and assigns, freed and discharged of and from all charges and incumbrances whatsoever to be made, done, committed, or privily suffered by the said plaintiff, his executors, administrators, and assigns.* On the 7th day of July, 1828, the said ship or vessel, the *Star*, was about to leave the said port of *London*, upon a voyage to the *West Indies* or elsewhere beyond sea, and back to the said port of *London*: and thereupon she, the

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defendant, as attorney for the said *James Bishop* as aforesaid, signed and delivered to one Mr. *Patrick Home*, as agent in that behalf for the said plaintiff, a certain paper writing in the words and figures following, that is to say,

“ *London, 7th July, 1828.*

“ Mr. *Patrick Home*, agent for Mr. *William Kerswill*, mortgagee of the brig *Star*.

“ Sir—I authorize you to receive from Messrs. *William Martin & Co.* the sum of two hundred pounds, when the outward freight of the brig *Star* shall have been received by them. And further engage, that, on this vessel's return from her intended voyage, you shall receive the balance of her freight inwards.

“ Given under my hand at *London*, this 7th day of *July, 1828.*

“ (Signed) *Jane Bishop*, attorney for *James Bishop*, owner of the brig *Star*.”

In the month of *January, 1829*, the said ship or vessel, the *Star*, was, in the course of her voyage mentioned in the said last-mentioned paper writing, in the harbour of *Kingston*, in the island of *Jamaica*, in the *West Indies*, seeking for a cargo on freight to *England*; whereupon several persons did in fact load on board the said ship or vessel, the *Star*, under agreement with the master thereof, different parcels and quantities of colonial produce, upon freight to *England*; and the same were by them consigned to different consignees in *Great Britain*; and the usual and proper bills of lading were respectively signed by the said master of the said ship or vessel, in respect or on account of the said merchandize so put and loaded on board thereof; and such bills of lading were delivered to the respective shippers or consignees. On or about the 3rd of *March, 1829*, the said ship or vessel, the *Star*, so laden as last aforesaid, departed from the said harbour of *Kingston*

aforesaid, on her homeward voyage to the port of *London*; and, on or before the 3rd of *May*, 1829, arrived in the river *Thames*, with such last-mentioned cargo on board; and on the said 3rd of *May*, 1829, while the said ship or vessel, the *Star*, was on her said voyage to, and shortly before she reached, the said port of *London*, the said plaintiff, by an agent, duly by him authorized in that behalf, took and obtained possession of the said ship or vessel, the *Star*, and her papers, and continued so possessed thereof, until the sale thereof hereinafter mentioned: and while in such possession of the said plaintiff, the said ship or vessel continued and completed the said last-mentioned voyage from the said harbour of *Kingston* to and entered the said port of *London* respectively aforesaid, with the said last-mentioned cargo on board. Shortly after such last-mentioned arrival in the said port of *London*, and while the said ship or vessel continued in such possession of the said plaintiff, the said ship or vessel, the *Star*, went into the *West India Docks*, and there delivered the whole of the said cargo into the warehouses of the *West India Dock Company*, from whence the same and every part thereof hath been delivered to the respective consignees thereof; and some of such consignees thereof have paid to the said plaintiff the freight thereupon due from them respectively; but the other of such consignees, on receiving their respective consignments, declined to pay the freight thereof to the said plaintiff, but respectively deposited the amount thereof in money with, and the same is now in the hands of the said *West India Dock Company*, pursuant to the act of Parliament in that case made and provided. On the 16th *September*, 1828, the said *James Bishop* departed this life, having first made his will; and thereby appointed the said defendant sole executrix thereof: and which will she duly proved, and is now the sole legal personal representative of the said *James Bishop*; and as such she now

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claims the freight so as herein aforesaid earned by the said ship or vessel, the *Star*; the amount of which has been deposited with, and is now in the hands of the said *West India Dock Company*, as hereinbefore is stated; and the said plaintiff claims the said last-mentioned freight, as such mortgagee of the said ship or vessel, the *Star*, and being in such possession thereof on the completion and termination of the said last-mentioned voyage. The plaintiff hath since sold and disposed of the said ship or vessel, the *Star*, and hath applied the whole of the money produced thereby, as well as the said freight by him received, in part payment of his said debt; but the money so received by the said plaintiff is insufficient to pay and satisfy the whole of the debt.

The question was, whether, under all the circumstances, the plaintiff or the defendant was entitled to receive the said freight unpaid, and the amount of which was in the hands of the said *West India Dock Company*.

*Maule*, for the plaintiff.—This is the case of a mortgaged ship, which is taken possession of by the mortgagee, as she is on her homeward voyage. And the question is, whether the mortgagee or the representative of the mortgagor is entitled to the freight of such homeward voyage. The point intended to be raised is, whether, since the 45th section of the new registry act (a), freight so accruing belongs to the mortgagor or mortgagee.

Before that enactment, it is clear, from many cases, that the mortgagee so taking possession is entitled to the accruing freight, and that the transfer of the ship was a transfer of the accruing freight. Now, the 45th section of the 6 Geo. 4, c. 110, was made for the benefit of mortgagees, and to relieve them from liabilities to which they might

(a) 6 Geo. 4, c. 110.

otherwise have been subject; and not to narrow the rights which they previously had: amongst which was the right of taking possession. The statute provides, "that the officers shall in the entry in the book of registry, and also on the certificate of registry, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect. And the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof, be deemed to be the owner or owners of such ship or vessel, share or shares thereof: nor shall the person or persons making such transfer be deemed by reason thereof to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made; except so far as may be necessary for the purpose of rendering the said ship or vessel, share or shares so transferred, available, by sale or otherwise, for the payment of the debt or debts for securing the payment of which such transfer shall have been made." It is quite clear from the exception, that the legislature intended to benefit the mortgagees of ships, and not to narrow their rights. The present case falls within the very words of the exception; as it is necessary that the plaintiff should be owner, for the purpose of rendering the ship available, by sale or otherwise, for the payment of the debt for securing the payment of which the transfer was made. Numerous cases shew that the transfer of the ship transfers the accruing freight. *Morrison v. Parsons* (a) was the case of an assignment of a ship by a person who had chartered her previous to the assignment, and who afterwards assigned the charter-party to a third person; and yet the Court held that the as-

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signee of the ship was entitled to the freight earned subsequently to the assignment, as incident to the ship. In *Case v. Davidson* (a), the question was between the underwriters on the ship, and the underwriters on the freight. A ship and freight had been insured by different underwriters; and, on a capture, both ship and freight were abandoned to the respective underwriters, and a total loss was paid both on the ship and the freight. Afterwards the ship was recaptured, and earned freight; and it was held, that such freight belonged to the underwriters on the ship, as incident to the ship. This case was much discussed, and it was taken for granted both at the bar and by the bench, that a contract of sale of the ship would carry the right to the accruing freight. It seems never to have struck the learned persons engaged in that case, that there could be any doubt, that, in the ordinary case of the sale of the ship, the growing freight would pass: though such a point would have been of great importance in the case. That was a very strong decision, because, in the contract of insurance, the word ship does not include freight; as, if the policy had been open, and the underwriters on the ship forced to pay, the freight would not have been included; and yet so strong did the Court of *King's Bench* and the Court of *Exchequer Chamber* feel the general rule to be, that they held the underwriters on the ship entitled to the freight. In *Splidt v. Bowles* (b), it was held, that a covenant in a charter-party to pay freight was not transferred to the vendee by bill of sale of the ship made during the voyage, but that the assignees of the owner, who had become bankrupt, were entitled to recover the freight. That case is not inconsistent with the argument for the present plaintiff, as it would not follow from the vendee or mort-

(a) 5 M. & S. 79; 2 Brod. & Bing. 379, S. C. in error.

(b) 10 East, 279.

gagee having a right to the freight, that he would have a right to sue for it on a contract by deed made by the owner. The 14ths there would be held in trust for the vendor, as the bankruptcy does not pass trust property (a). Lord *Ellenborough*, in *Splidt v. Bowles*, merely considers who had the title at law under the covenant. [*Bayley*, B.—The certificate there was certainly worded *at law* (b).] The law then, before the passing of the 6 Geo. 4, c. 110, being clear in this respect, it is equally clear that the 45th section of that statute does not alter it as against mortgagees, especially as against mortgagees who have taken possession. *Dean v. M'Ghie* (c) is an express authority upon this point. There, as here, the mortgagees took possession of the vessel at *Gravesend*, as she was returning to her port. *Gaselee*, J., says, the statute 6 Geo. 4, c. 110, was passed for the benefit of the mortgagee, and not to deprive him of any means of indemnity against loss. And afterwards he says—"But the cases all shew that the mortgagee of the ship has a right to the freight." [Lord *Lyndhurst*, C. B.—In *Chinnery v. Blackburne* (d), it was held, that, when the mortgagee does not take possession, he is not entitled to the freight.] In that case, the mortgagee had no right to receive it; because he allowed the mortgagor so to do: he left the right of lien in the hands of the mortgagor, who delivered the goods; and so an *assumpsit* arose to pay the freight to him. The mortgagor might, therefore, be considered as the agent of the mortgagee. [*Bayley*, B.—The real question is, whether a mortgagee who takes possession at the conclusion of the voyage is entitled to the freight to

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(a) *Winch v. Keeley*, 1 T. R. 619.

(b) The certificate is not given in the printed report; but it is clear from the judgment that the certificate would be as stated by

the learned Baron.

(c) 12 J. B. Moore, 185; S. C. 4 Bing. 45.

(d) 1 H. Bl. 117, in notes. See the same case in 3 Doug. 394 by the name of *Chinnery v. Blackman*.

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accrue from such voyage, when the mortgagor has been at the expense of the outfit. *Dean v. M'Ghie* certainly goes that length. *Splidt v. Bowles* turned on the question of the right to sue at law. *Case v. Davidson* was a question of abandonment, whether the freight would belong to the abandonee of the ship or of the freight.] The mortgagee has under the deed, before the voyage, an inchoate right, which is completed and perfected by his subsequently taking possession. There is nothing mischievous in such a right; for the sailors and persons furnishing the outfit have no specific right to look to the freight. It is submitted that the mortgagor of the ship in possession has always been deemed entitled to the accruing freight; and that there is nothing in the late registry act to alter the law in this respect.

*Shee, contrà.*—The ship only was mortgaged, and throughout the whole conveyance the freight is not mentioned; and indeed, according to *Robinson v. Macdonnell* (a), an assignment of the freight, earnings, and profits of a ship does not extend to pass freight not then in existence. The only question therefore is, whether freight accruing after the mortgage will pass as incident to the ship. Before the 6 *Geo.* 4, c. 110, the mortgagee appeared as absolute owner. Formerly, in cases of bankruptcy, in which such points would otherwise have been most likely to arise, the assignees were entitled to the freight, as the ship passed (b) under the order and disposition clause. It has been assumed on the other side, that, as the law stood before the 6 *Geo.* 4, c. 110, assignment, transfer, and mortgage, were synonymous. That was not so; for, the absolute assignee and the mort-

(a) 5 M. & S. 228.

(b) See 6 *Geo.* 4, c. 16, s. 72,  
which enacts, that the order and

disposition clause shall not apply  
in case of a mortgage of a ship  
duly registered, &c.

gagee stood in a very different situation. The cases which occurred on the question whether the mortgagee was liable as owner for necessities supplied to the ship, are applicable. In *Jackson v. Vernon* (a), it was decided, that the mortgagee was not absolute owner, and not liable for necessities. The Judges drew a distinction between a mortgage and an absolute assignment. *Chinnery v. Blackburne* was there said by Mr. Justice *Wilson* to have been decided on the ground that as a mortgagee out of possession was not liable to the charges of the ship, so he was not entitled to the freight. Lord *Mansfield*, in *Chinnery v. Blackburne*, expressly repudiates the notion that the mortgagor is the agent of the mortgagee. It is submitted that there is no principle of law which decides this case against the defendant, and that none of the cases which have been cited are applicable. In *Morrison v. Parsons*, the assignment was absolute, and not by way of mortgage; and the assignor was the captain, who was in possession of her before and through the voyage. *Lawrence, J.*, says, that “*Sharpe v. Gladstone* is the only case that seems to bear on the point; according to the idea of Lord *Ellenborough*, in his judgment there, after the abandonment of the ship, the underwriters on a chartered ship would be entitled to freight earned afterwards.” Now, *Sharpe v. Gladstone* was a case of abandonment; and in that case, as well as in *Thompson v. Rowcroft* (b), Lord *Ellenborough* treated the abandonee as absolute and unqualified owner, as he undoubtedly is. In *Case v. Davidson*, both Mr. Justice *Abbott* and Lord *Ellenborough* express themselves most strongly on this point. All the cases of abandonment therefore must be viewed as cases of absolute sale, not of mortgage. *Splidt v. Bowles* was decided on the technical rule of law. It was a case between the assignees under a

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(a) 1 H. Bl. 114.

(b) 4 East, 52.

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commission of bankrupt against the owner and the assignee under an assignment by the owner. The Court held that the right of suing passed to the assignees under the commission. [Lord *Lyndhurst*, C. B.—Suppose the mortgagee of a real estate takes possession a few days before the rent-day.] The mortgagee of a real estate is the legal owner: the statute 6 *Geo.* 4 has declared that the mortgagee of a ship is not the legal owner. All the cases, therefore, which were decided on the ground of the party being owner are inapplicable. [*Bayley*, B.—Is he not owner when he takes possession?] No, he is certainly not liable for expenses. Is he to have the profits without the liability? *Dean v. M'Ghie* is not an authority, except from the *dicta* of the Judges, which were extrajudicial; for, it was a case of money had and received, in which the question was, whether the sum paid for the portage bill was to be allowed; and the Court in their judgment shew that they did not think it necessary to decide the point now under discussion. The Chief Justice said in that case, as it has been said to-day on behalf of the plaintiff, that the object of the statute was to confer a benefit on mortgagees, by exempting them from charges and responsibilities to which they were before liable. This opinion cannot be supported; for, there was no such liability before. The old registry acts imposed no such liability. This point has been decided again and again. *Annett v. Carstairs* (a), *Abbott on Shipping* (b), *Briggs v. Wilkinson* (c), *Jennings v. Griffiths* (d). The registry acts were passed with a very different purpose. Lord *Ellenborough* says, in *Robinson v. M'Donnell* (e), “they were passed for the purposes of public policy, to confine to *British* subjects and to *British* built ships the benefit of *British* trade. They were not intro-

(a) 3 Camp. 354.

(b) Page 17.

(c) 7 B. & C. 30; 9 D. & R. 871.

(d) 1 Ryan & M. 42.

(e) 5 M. & S. 238.

duced with any view to the convenience of individuals, or to give notoriety to this species of property, and to the conveyances affecting it; but the notoriety, as far as there is any, is a consequence of the measures adopted to effect the policy of the state." There was, however, an inconvenience which had arisen under the old registry acts. The assignees of an owner who had become bankrupt were entitled to the ship which had remained in the order and disposition of the bankrupt, though the legal interest was vested in a mortgagee by the registry. *Kirkley v. Hodgson* (a), *Monkhouse v. Hay* (b), *Hay v. Fairbairn* (c), *Robinson v. M'Donnell* (d). This was the reason of the interference of the Legislature; and, to remedy the mischief, they first declare, by section 45, what is the limited estate of the mortgagee; and they deduce as a corollary that the assignees of the bankrupt mortgagor shall have no interest in her as against the prior right of the mortgagee, that is, that the assignee shall only be entitled to the surplus. It is expressly enacted that the mortgagor shall not be the owner, thus taking away the only ground on which all the cases cited on the other side have proceeded. The 72nd section of the new Bankrupt Act, 6 Geo. 4, c. 15, shews that the case of a mortgage is treated as quite distinct from that of a sale, and is an exception to the general rule as to transfers and assignments; as the freight then belongs to the owner, and the mortgagee is no longer owner, it must go to the mortgagor, not to the mortgagee. This is in concordance with the civil law, according to which profits to come are not the subject of pledge (e).

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*Maule*, in reply.—*Pothier*, in the passage referred to, was speaking of pawning, and pointing out the distinction be-

(a) 1 B. & C. 588; 2 D. & R. 848.

(b) 2 B. & B. 114.

(c) 2 B. & A. 193.

(d) 5 M. & S. 228.

(e) *Pothier Traité de Nantissement*.

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tween pawning and hypothecation. He affirms merely that things not in existence are not the subject of the contract of *pignus*, which requires delivery (a).

The following certificate was afterwards sent.—

This case has been argued before us by counsel. We have considered it, and are of opinion that the plaintiff is entitled to the freight now unpaid.

LYNDHURST.  
J. BAYLEY.  
W. BOLLAND.  
J. GURNEY.

(a) See Dig. 13, 7, 9, 2; *proprie nec possessio ad creditorem*. See *pignus dicimus quod ad creditorem* also Abbott on Shipping, 11. *transit, hypothecam cum non transit,*

#### JOHNSON v. POPPLEWELL.

If an affidavit (verifying a plea in abatement which refers to the declaration) is sworn before the declaration is delivered, the plaintiff may treat the plea as a nullity and sign judgment.

The Court set aside the judgment on payment of costs, on an affidavit by defendant's agent in town that he was informed and believed there were merits, there being circumstances of contrivance in the delivery of the declaration.

IN this case the declaration in *assumpsit* was delivered to the defendant's agent in *London* after post time on *Saturday*, the 28th *April*, and the defendant, who lived in *Yorkshire*, pleaded in abatement that the promises contained in the declaration were made jointly with one *James Wilkinson*. The affidavit of verification was sworn in *Yorkshire* upon the 17th *April*, on which ground the plaintiff treated the plea as a nullity, and signed judgment.

*Starkie* moved for a rule to set aside the judgment for irregularity, or to set it aside on an affidavit of merits which was made by the defendant's *London* agent, who swore that he had been informed and believed that the defen-

dant had a good defence upon the merits. He cited *Lang v. Comber* (a), and referred to the *dictum* of Mr. Justice Bayley in *Baskett v. Barnard* (b), that “an affidavit to support a plea in abatement may be made before declaration.” [Bayley, J.—In *Bower v. Kemp* (c), this Court decided that such an affidavit as the present was bad, because it referred to a declaration not then in existence. How can a man know by foreknowledge what the declaration will contain. The *dictum* in the case in *Maule & Selwyn* was the opinion of a single Judge.] The four Judges agreed in the same opinion in *Lang v. Comber*. At all events, such a plea ought not to be treated as a nullity, and the plaintiff had no right to sign judgment.

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BAYLEY, B.—I think that on principle and common sense the affidavit cannot be supported; but, as there are conflicting authorities, you may take a rule to shew cause.

Rule *nisi* granted.

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*Blackburne* shewed cause.—*Bower v. Kemp* decides that a plea in abatement is not supported by an affidavit referring to the declaration, and sworn before such declaration is delivered; and it also shews that the plaintiff may in such case treat the plea as a nullity, and sign judgment. As to the other part of the application, the affidavit of merits is insufficient, as it is not sworn by the defendant, or even his attorney or attorney's managing clerk (d), but merely by the *London* agent, who only states his information and belief, without stating from whom he had re-

(a) 4 East, 348.

(b) 4 M. & S. 332.

(c) 1 C. & J. 288.

(d) *Neesom v. Whytock*, 3 Taunt.  
403.

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ceived such information. In *Bower v. Kemp*, the Court held that an affidavit of a *meritorious defence* was insufficient.

*Starkie*, in support of his rule.—In principle the present case is not distinguishable from *Lang v. Comber*. In that case the defendant swore the affidavit at *Liverpool* on the day the declaration was delivered in town. It was therefore as impossible as in this case that he could know the contents of the declaration. The Court said, that, as the defendant might have had very good reasons for believing that what he swore must accord with the truth, and, as the affidavit did, in point of fact, accord with the truth, they would not consider the plea as a nullity, but would leave the plaintiff to his indictment for perjury. [*Bayley*, B.—How could he be indicted for perjury in swearing that the promises contained in the bill, if any such were made, were joint, when no bill was in existence.] Perhaps, an indictment might be framed alleging, that, in point of fact, the promises were made solely. [*Bayley*, B.—I think not. Perhaps the Court would give time for filing the affidavit of the truth, on the special ground that the party lived at a great distance, and that the declaration was filed so as to prevent the putting in a plea of non-joinder, which may be and often is an honest plea. The objection to this affidavit is, the incongruity of swearing as to promises in the bill, when at that time no promise was mentioned in any bill. In the present case, you do not shew by affidavit that you never made but one contract with the plaintiff, and that, if you did make any contract, it was joint.] The affidavit is the same in effect as the one suggested, and is the same as the one used in *Lang v. Comber*. Here, the declaration was purposely served after post time on the *Saturday* night. If this objection is to prevail, there must be one law on this subject for *London* and another for the

country. The statute of *Anne* (a) only requires the defendant to prove the truth by affidavit, or to shew some probable matter to the Court to induce them to believe that the plea is true. In this case, the plaintiff does not venture to swear that the promise was sole, and therefore there is quite probable matter enough within the statute to induce the Court to believe that the plea is true.

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BAYLEY, B.—There is an affidavit of merits by the agent in town; and, as he takes upon himself to swear that he believes there is a good defence upon the merits, I think that the defendant should be let in to try the cause upon payment of costs, especially under circumstances of contrivance as to the delivering the declaration.

Upon the other question, I am of opinion that the judgment was regularly signed. To verify such a plea, you must have an affidavit; and, if there is not a proper affidavit, the plea may be treated as a nullity. Now the affidavit here is similar to the one in *Bower v. Kemp*, as it refers to a plea in abatement, which alleges that the promises in the declaration were entered into jointly with another person, and it was made on the 17th *April*, a time when it was impossible to connect the affidavit with any bill; it would be impossible, therefore, to indict a defendant on an affidavit of this nature, if false. *Lang v. Comber* has been considered to be at variance with *Bower v. Kemp*. In that case, however, a bill was in existence on the day when the affidavit was sworn, and the Court was thereby relieved, in some measure, of the incongruity and absurdity of an affidavit as to the contents of the non-existing declaration. It is possible that the *dictum* in *Baskett v. Barnard* may be correct, and that an affidavit sworn before declaration may be sufficient if it do not refer to the declaration, but merely state that the defendant had never promised or con-

(a) 4 & 5 Anne, c. 16, s. 11.

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tracted except jointly; but if he refer to a particular bill, he ties himself down to that bill; and, as he cannot tell by foreknowledge what such bill will contain, an affidavit so referring is bad, according to principle and common sense.

VAUGHAN, B.—This case is distinguishable from *Lang v. Comber*, as in this case no bill existed when the affidavit was sworn. In *Lang v. Comber*, the declaration to which the plea referred was in existence when the affidavit was sworn.

BOLLAND, B.—I think that *Lang v. Comber* must have proceeded on the distinction alluded to by my learned Brothers. I cannot see how, if such an affidavit were false, the deponent could be indicted for perjury. Such an affidavit might be made before the action was brought, and might be quite extrajudicial.

Rule absolute, *on payment of costs.*

GLEADOW and Others, Executors of GLEADOW, v. ATKIN  
and Another, Executors of ATKIN.

Debt, on a common money bond, by executor of obligee against executor of obligor.

Plea—that the

DEBT on bond, entered into by *Atkin*, the testator, and one *Boyle*, conditioned for the payment of 250*l.* to *Gleadow*, the testator.

money mentioned in the condition was part of the personal estate of *A. B.*, deceased, by whom it had been bequeathed to the testator of the plaintiff and the testator of the defendant, and the survivor of them, and the executors and administrators of such survivor, upon trust to put and place the same out at interest, upon such real or other sufficient security as they might approve of, and to pay the interest, &c., &c.; that the testator of the plaintiff died, leaving the testator of the defendant surviving; whereupon the said personal estate of *A. B.* vested in the defendant's testator, to be by him and his executors and administrators applied according to the trusts of the will of *A. B.*:—*Held*, on general demurrer, that the plea was bad.

The defendants pleaded, amongst others, the following plea—*Actio non*, &c.; because they say, that, heretofore, to wit, on the 14th day of *August*, 1800, at the county of *York* aforesaid, one *Cuthbert Thew* made his last will and testament in writing, and thereby gave and bequeathed unto the said *Robert Gleadow*, since deceased, and the said *John Atkin*, and the survivor of them, and the executors and administrators of such survivor, all and singular his stock and implements in trade, the lease of his house, his ready money, bills, bonds, notes, mortgages, and other securities for money, debts due and owing to him, and all other his personal estate and effects whatsoever and wheresoever (except his household furniture to his wife for life, and subject to the payment to her of the sum of 160*l.*); upon trust (amongst other things) that they the said *Robert Gleadow* (since deceased) and *John Atkin* (since deceased), or the survivor of them, or the executors or administrators of such survivor, should forthwith, or as soon as conveniently might be after his decease, sell and dispose of such part of his personalty as was saleable, and collect and receive all his debts owing to him, and the money arising from such sale, with the debts to be received, the amount of monies owing to him on securities, with the ready money he might die possessed of, he the said *Cuthbert Thew* willed and directed that his said trustees, or the survivor of them, or the executors or administrators of such survivor, should put and place out at interest, on real or other sufficient securities, as they should approve of, and pay the interest thereof, as the same should accrue and be received by them, unto his said wife or her assigns, during her natural life. And the said *Cuthbert Thew* by his said will appointed the said *Robert Gleadow* (since deceased), and the said *John Atkin* (since deceased), executors thereof. And the said defendants, executors as aforesaid, further say, that the said *Cuthbert Thew*, afterwards, to wit, on the 1st day of Oc-

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*tober* in the year aforesaid, at the county aforesaid, died without altering or revoking his said will; and that thereupon the said *Robert Gleadow* (since deceased) and the said *John Atkin* (since deceased) took upon themselves the execution of the said trusts in the said will mentioned; and that the said wife of the said *Cuthbert Thew* is still in full life, to wit, at the county aforesaid. And the said defendants, executors as aforesaid, further say, that the said sum of money in the said condition of the said writing obligatory mentioned, was part of the personal estate of the said *Cuthbert Thew*, and as aforesaid bequeathed to the said *Robert Gleadow* (since deceased) and the said *John Atkin* (since deceased), and the survivor of them, and the executors or administrators of such survivor, to be by them applied according to the trusts of the said will, and was not the proper money of the said *Robert Gleadow* (since deceased); and that the said writing obligatory was given to secure the payment to the said *Robert Gleadow* (since deceased), as such trustee as aforesaid of the said money and interest, the same being money to be applied according to the trust specified in the said will of the said *Cuthbert Thew*. And the said defendants further say, that the said *Robert Gleadow* in the said writing obligatory mentioned, afterwards, to wit, on the 17th day of *September*, 1826, at the county aforesaid, died, leaving the said *John Atkin* (since deceased) him surviving; whereupon all and singular the said personal estate by the said *Cuthbert Thew* bequeathed as aforesaid to the said *Robert Gleadow* (since deceased) and *John Atkin* (since deceased), and the survivor of them, and the executors and administrators of such survivor, became and was vested in the said *John Atkin* (since deceased), to be by him and his executors and administrators applied according to the said trusts of the said will of the said *Cuthbert Thew*; and this &c., wherefore, &c.

General demurrer and joinder.

*Alexander*, in support of the demurrer.—The plea affords no answer to the action. It discloses matters of mere parol; and they cannot vary a claim under seal. A defeazance must be by matter as high as the instrument to be defeated. Therefore, where, in debt on bond, conditioned for payment of 20*l.* on a certain day, the defendant pleaded, that, before the day, the plaintiff, on account of a trespass committed by his cattle on the defendant's lands, gave him a further day of payment, the plea was held bad on demurrer, because an agreement by *parol* cannot dispense with a *deed*. *Hayford v. Andrews* (a). That rule is fixed by a long series of authorities, and cannot now be shaken. *Blemerhasset v. Pierson* (b); *Rogers v. Payne* (c); *Roe v. Harrison* (d); *Mease v. Mease* (e); *Little v. Holland* (f); *Davey v. Prendergrass* (g). There is no objection to the suit on the ground of the co-executorship of the parties. The bond, in terms, treats them as independent parties, and, *quoad* the right of action which it gives, they lose the character of co-executors. *Foster v. Allanson* (h). But it will be argued, on the part of the defendants, that the plea is calculated to prevent circuitry of action, and therefore is an answer to the declaration. The cases upon this subject are collected in 2 *Wms. Saund.* 149 a, n. 2. They will, however, on examination, be found inapplicable. The true principle to be applied to the present question is found in *Moore*, 23, pl. 80; *viz.* that a cause of action against a plaintiff will be no bar to an action by him for avoiding circuitry of action, when the recovery in both actions is *not equal*. Now, in this case, the parties are not on an equal footing. By allowing his

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(a) Cro. Eliz. 697.

(b) 3 Lev. 234.

(c) 2 Wils. 376.

(d) 2 T. R. 425.

(e) Cowp. 47.

(f) 3 T. R. 590.

(g) 5 B. & A. 187.

(h) 2 T. R. 479.

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co-executor to have the testator's money on his mere personal security, *Gleadow* became liable as for a *devastavit*; *Wilkes v. Steward* (a); *Langston v. Ollivant* (b); and, upon *Gleadow's* death, that liability devolved upon his executors, the plaintiffs. 4 & 5 *W. & M. c.* 24, s. 12. They have, consequently, a right to recover the amount of the bond debt, in order to insure its due application, pursuant to *Thew's* will, and so protect themselves against the consequences of their testator's *devastavit*. Until the trust is duly performed, they are liable to *Thew's* widow, and this bond is their only indemnity. But the defendants are very differently circumstanced. Their testator has actually had the money in question; and on what principle can it be argued that he is now also entitled to the security? The bond could not, at law, be made available in the hands of the defendants, for they cannot sue themselves. *Cheetham v. Ward* (c). *Thew's* estate would, therefore, be deprived of a better security, if the bond could not be enforced by the plaintiffs. In all the cases upon the doctrine of circuitry, will be found one or other of the following ingredients—either there were *parol* liabilities and *parol* defences; or covenants by *deed*, defeating liabilities by *deed*; or between parties in the *same* right, and without any *liabilities* to third persons; or where mutual rights of action were existing. But the present case is without any one of those ingredients. The liability is by *deed*; there is no covenant by *deed* defeating it; the plaintiffs are liable over to a third person; and the defendants have no right of action against the plaintiffs. If the doctrine of circuitry of action do not apply to this case, the plea is clearly insufficient, and the plaintiffs are entitled to judgment.

(a) *Coop. Rep.* 6; 2 *Cox Rep.* 1.

(b) *Coop. Rep.* 33.

(c) 1 *B. & P.* 630.

*Cresswell, contra.*—The argument for the plaintiffs proceeds on the assumption that the estate of the defendants' testator is insufficient to discharge the bond debt. There is no suggestion to that effect upon this record. If the money had been lent by *Atkin* in *Gleadow's* life-time, and *Atkin* had left no money of his own wherewith to satisfy the debt, it might have perhaps rendered the plaintiff's testator liable; but, unless there were a *devastavit* in his lifetime, his executors are not liable. [*Bayley, B.*—Is not the lending to a person who has no right to borrow, a misapplication?] No liability would arise therefrom until a loss happened. But, suppose that the plaintiffs were to recover in this action, the defendants would have an immediate right to recover this money back from the plaintiffs. They might immediately bring an action for so much money had and received to their use; for, when *Gleadow* died, *Atkin*, as the surviving trustee, was entitled to the whole sum. There is nothing to shew that the money in question had ever been in the hands of *Gleadow*, or that he did any thing more than allow *Atkin* to hold what he had received. It does not at all appear that *Gleadow* had handed over this money to *Atkin*; and there is nothing in the pleadings to shew that *Gleadow* had ever incurred any liability whatsoever. No proceedings could have been taken against *Gleadow*, for allowing the money to remain in *Atkin's* hands. [*Bayley, B.*—Would not a Court of Equity have said, that this was a misapplication, and have insisted on the money being laid out in a proper manner? If a bill had been filed against *Gleadow's* executors and *Atkin's* executors, and *Atkin's* estate had been insolvent, might not *Gleadow's* estate have been liable to make up any deficiency. If so, have not *Gleadow's* executors an interest in this money being properly applied; and have they not a right to protect themselves by this security? Is not their liability sufficient to give them a right to sue upon this bond?] There would be no such

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liability, unless *Atkin's* estate had been insolvent at the time of *Gleadow's* death. That does not appear by the pleadings; and, if it were the fact, it ought to have been replied. This plea is not an attempt to avoid a bond by parol, like *Davey v. Prendergrass*; but it sets up as a defence, that the money to be recovered in this action must immediately come back to the defendants, and that they could recover it from the plaintiffs in another action, and the law makes this a defence, to prevent a circuitry of actions. *Bishop v. Hayward* (a), *Teague v. Hubbard* (b). In effect, the plea admits the bond and avoids it, and it was clearly competent for the defendants to shew on their plea the real nature of the transaction, so as to avoid the bond. *Grenville v. Attkins* (c), *Paxton v. Popham* (d). The defendants do not contend that there was an agreement by parol not to sue, but they say the right to sue is gone, and that, under the will of *Thew*, the whole interest, upon the death of *Gleadow*, vested in *Atkin*. In *Bottomley v. Brooke*, cited in *Winch v. Keeley* (e), the defendant in an action of debt on bond pleaded that the bond was given for securing 100*l.* lent to the defendant by one *E. C.*, and was given to the plaintiff in trust for her, and that *E. C.*, before the commencement of the action, was indebted to the defendant in more money than the amount of the bond; and, on demurrer, this was considered a good plea. [*Bayley, B.*—That was a plea of set-off, for money due from the *cestui que use*, of the money due on the bond. Such pleas are, I believe, frequently pleaded now.] *Rudge v. Birch*, cited in the same case (f), is to the same effect. It appears from this class of cases, that it is a good plea to shew that money to a greater amount than the sum claimed is due from the *cestui que use* to the defendant; and

(a) 9 East, 408.

372.

(b) 8 B. & C. 345; 2 M. & R.

(d) 9 East, 408.

69.

(e) 1 T. R. 621.

(c) 9 B. & C. 469; 4 M. & R.

(f) Ibid. 622.

that a party in such circumstances is not bound to pay the trustee. The loan of the money to a third person would not be a *devastavit*, and it can make no difference that the money is lent to one of the trustees. [*Bayley*, B.—It will require the approbation of both the trustees. Lord *Lyndhurst*, C. B.—It is clear, that in a Court of Equity it would be held a misapplication. A Court of Equity would never allow a trustee to lend to himself.] The money was left in the hands of a person who was entitled to hold it, and it does not appear on the record that any injury arose from its being so left.

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*Alexander*, in reply.—None of the authorities cited bear upon the question, because none of them negative the liability of *Gleadow* and his executors as for a *devastavit*. That single point is sufficient to decide the case.

LORD LYNTHURST, C. B.—I am of opinion that the plaintiff is entitled to recover. The direction of the will is, that the trustees should put and place out the money at interest on real or other sufficient security as they should approve of; and I am of opinion that a loan by one to another of these executors, was a misappropriation of the fund, and an improper discharge of their duty; and that, if any mischief had arisen to the estate of the deceased therefrom, the executors would be liable. If the money were paid over to *Gleadow's* executors, and were then paid back to *Atkin's* executors, as the representatives of the surviving executor, *Gleadow's* estate might, perhaps, be discharged; but, if it be not paid over, and *Atkin's* estate were to prove insolvent, *Gleadow's* estate would still remain liable for the original misapplication. I think, therefore, that the plaintiffs have a right to sue on this bond; and the money, when received, may be paid back, so that the estate of *Gleadow* may be protected.

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BAYLEY, B.—I am of the same opinion; and I cannot say that I feel any difficulty in the case, though I agree that we cannot travel out of the record. The bond is a common bond, in which *Atkin*, one of the executors of *Cuthbert Thew*, is one of the obligors, and *Gleadow*, the other executor of *Thew*, is the obligee. Now, the plea is, that *Cuthbert Thew* made his will, and by that will directed his executors to put out his personal estate on real or other securities, as *they* should approve of, and to pay the interest according to the further directions of the will; and then the plea proceeds to state that the money mentioned in the condition of the bond was part of the personal estate of *Thew*, and that *Gleadow* afterwards died, and *Atkin* survived him, whereby the money vested in *Atkin*, who has since died. Now, what authority had *Gleadow* and *Atkin* over this personal estate, which originally belonged to *Thew*? Why, their authority was to lay it out on sufficient security which they were to approve of. I entertain a very clear and distinct opinion, that one had no right or power to lend it to the other, or to mix it up with the estate of one of themselves. I think that the effect of the taking the bond for this money was, that the money in question might be mixed with *Atkin's* own money: and there is a great difference between mixing and keeping distinct such a fund. In the case of bankruptcy, if such a fund be kept distinct, it would belong to the trustees, and not pass to the assignees. In case of death, it would belong to the survivor bodily, if kept distinct; but if mixed, the survivor might have to come in *pari passu* in the order of administration. Now, this being a misappropriation, in what situation do the executors of *Gleadow* stand? It seems to me that they stand in the predicament of being liable until the money is laid out on real and sufficient security; and that they become liable, and remain liable to the persons entitled under *Thew's* will, for not so laying out that money: and I think that on a

bill in equity against the executors of *Gleadow* and of *Atkin*, the estate of *Gleadow* would be liable to make good any loss on such money. If so, have not the executors of *Gleadow* a right to sue on this bond to protect themselves? If there had been an express contract for the purpose of indemnifying *Gleadow*, it is clear that this plea would be no answer; and it seems to me that the instrument in this form speaks as distinctly as an express contract. It is asked, on the part of the defendants, what use is it to make the defendants pay this, when they will have a right to receive it back? I think that one great use will be, to separate the fund from the present estate of *Atkin*. Then the persons entitled under the will of *Thew* will have a right to lay their hands upon it, and to have it laid out, as directed by the will. When returned, it will be the duty of *Atkin's* executors to keep it distinct, so that the general creditors of *Atkin* shall have no right upon it. The payment will also give to the plaintiffs the opportunity of giving notice to the persons entitled under *Thew's* will, to apply to a Court of Equity. I am, therefore, of opinion, that we are only giving to the plaintiffs the protection to which they are entitled, by allowing them to recover on this bond.

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BOLLAND and GURNEY, Barons, concurred.

Judgment for the plaintiffs.

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A bishop issued a requisition under 57 Geo. 3, c. 99, s. 50, requiring the vicar of *W.* to nominate a curate with a stipend; on the ground that it appeared to the bishop, of his own knowledge, that the ecclesiastical duties of the vicarage and parish church of *W.* were inadequately performed by reason of the vicar's negligence. The vicar appointed no curate, and did not appeal to the archbishop. The bishop, after three months, licensed the Rev. *A. B.*, clerk, as curate of *W.*, with a stipend. The vicar refused to allow *A. B.* to officiate; upon which the bishop issued a mandate or summons to shew cause why the vicar should not pay the stipend due, and ultimately proceeded to sequestration:—*Held*, that the requisition upon which the whole of the proceedings were founded was in the nature of a judgment, and void, as the party had had no opportunity of being heard.

Such a requisition ought to state particular instances of negligence, or shew *how* the incumbent was negligent.

*Per Vaughan and Bolland*, Barons, the 50th section of the 57 Geo. 3, c. 99, does not apply to the case of a benefice with only one church and no chapel.

**ASSUMPSIT** for money had and received. At the trial before Lord *Tenterden*, C. J., at the Summer Assizes, 1831, for the county of *Hertford*, the jury found a verdict for the plaintiff, with 5*l.* 13*s.* damages, subject to the opinion of this Court upon a special case, which stated as follows:—

The plaintiff is, and for twenty years and upwards last past has been, vicar of *Watford*, in the county of *Hertford*, and in the diocese of the Bishop of *London*; and during the whole period of his incumbency, the vicarage-house at *Watford* was his ordinary place of abode. The vicarage is a benefice with cure of souls. There is only one church belonging to the benefice, and no chapel. The population exceeds 5,000. On the 12th *January*, 1830, a requisition was issued by the Bishop of *London* to the plaintiff, in the words following:—

“*Charles James*, by divine permission, Bishop of *London*, to the Honorable and Reverend *William Capel*, clerk, vicar of the vicarage and parish church of *Watford*, in the county of *Hertford*, and within our diocese and jurisdiction. Whereas, it appears to us *of our own knowledge*, that the ecclesiastical duties of the said vicarage and parish church of *Watford* are inadequately performed *by reason of your negligence*; we do therefore, under and by virtue of an act of Parliament, made and passed in the 57th year of the reign of his late Majesty King *George* the Third, intitled, ‘An act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their be-

nefices, and for the support and maintenance of stipendiary curates in *England*,' monish and require you to nominate to us a fit person, with a stipend of not less than 75*l. per annum*, to be licensed by us to assist in performing the ecclesiastical duties of the said vicarage and parish church of *Watford*; further monishing you, that, if you shall neglect or omit to make such nomination for the space of three months after this requisition, we shall proceed to appoint a curate according to the tenor of the said act. Dated the 12th day of *January*, in the year of our Lord 1830, and in the second year of our translation.

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This requisition was served on the plaintiff on the 18th *January*, 1830; it was not founded on any affidavit; and there being no file in the Registry of the Bishop's Court for the reception of such documents, was, in the same manner as other documents of a similar description are usually deposited there, deposited in the said registry on the 19th *January*, 1830. The plaintiff did not appoint a curate pursuant to this requisition, nor appeal to the archbishop of the province to which the said bishop belonged; and on the 2nd day of *July*, 1830, the bishop licensed the Rev. *Arthur Hubbard*, clerk, to the office of stipendiary curate in *Watford*, by the following license:

" *Charles James*, by divine permission, Bishop of *London*, to our beloved in Christ, *Arthur Hubbard*, clerk, B. A., greeting; We do, by these presents, give, and grant unto you, in whose fidelity, morals, learning, sound doctrine, and diligence, we do fully confide, our license and authority to perform the office of stipendiary curate in the parish church of *Watford*, in the county of *Hertford*, within our diocese and jurisdiction, in reading the common prayers and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the *Book of Common Prayer*, made and published by authority

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of Parliament, and the canons and constitutions in that behalf lawfully established and promulged, and not otherwise, or in any other manner, you having first before us subscribed the articles, taken the oaths, and made and subscribed the declaration, which in this case are required by law to be subscribed, made, and taken; and we do, by these presents, assign unto you the yearly stipend of 75*l. per annum*, to be paid quarterly, for serving the said cure; and also a further sum of 15*l. per annum*, in lieu of a house; and we direct that you reside in the parish. In witness whereof, we have caused our seal, which we use in this case, to be hereto affixed. Dated the 2nd day of *July*, in the year of our Lord 1830, and in the second year of our translation.

*John Sheppard, Deputy Registrar."*

The bishop caused a copy of this license to be entered in the registry of the diocese of *London*, on the 25th day of *August*, 1830; and on the same day a copy was transmitted by the registrar of the diocese, by the post, to the churchwardens of the parish of *Watford*. The plaintiff refused to permit Mr. *Hubbard*, who has been ready to assist in the duty since he was licensed, to act as his curate, though Mr. *Hubbard* tendered himself for that purpose; and no part of the duty of the benefice has been on account of such refusal performed by him. On the 22nd *February*, 1831, the bishop of *London* issued a mandate or summons to the plaintiff, under his hand and private seal, which, after reciting the monition of 12th day of *January*, 1830, and license above set forth, concludes as follows:—  
“ And whereas it hath been represented unto us, that, on the 2nd day of *January* last past, the sum of 37*l. 10s.* was due to the said *Arthur Hubbard*, for half a year's stipend so assigned to him as aforesaid; and moreover that the said *Arthur Hubbard*, hath made due application to and demand on you for payment of the said stipend so in arrears; but that the same still remains unpaid; and that a difference hath arisen between you and the said *Arthur Hub-*

*hard*, touching the said stipend or allowance, or the payment thereof. Now, we do therefore, under and by virtue of the before-mentioned act of Parliament, require you by these presents to appear before us at *London House, St. James's Square*, in the parish of *St. James, Westminster*, in the county of *Middlesex*, within our diocese, on *Tuesday*, the 1st day of *March* next ensuing, at 11 of the clock in the forenoon of the same day, then and there to shew cause, if you know or have any, why the said stipend so in arrear as aforesaid should not be paid and satisfied, and to hear and receive our determination in the premises. And we do hereby further intimate to you, that, if you do not appear at the time and place above-mentioned, or, appearing, do not shew good and sufficient cause, as aforesaid, we shall proceed as by the said act we are empowered. Given at *London*, the 22nd day of *February*, in the year of our Lord, 1831, and in the third year of our translation.

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“*John Sheppard, Deputy Registrar.*”

A duplicate of this mandate or summons was duly served on the plaintiff, who did not attend the bishop pursuant thereto; and, on the 4th day of *March*, the bishop issued a monition, under his hand and seal, to the plaintiff; which, after reciting the said monition of the 12th *January*, 1830, and the licence above set forth, concludes as follows:

“And, whereas a difference having arisen between you and the said *Arthur Hubbard* touching the said stipend or allowance, or the payment thereof, we did, on or about the 22nd day of *February* now last past, issue our order or mandate, requiring you to appear before us, at *London House, St. James's Square*, in the parish of *St. James, Westminster*, in the county of *Middlesex*, within our diocese, on *Tuesday*, the 1st day of this present month of *March*, at 11 of the clock in the forenoon, to hear and receive our determination in the premises. And intimating,

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that, if you did not appear, or, appearing, did not shew good and sufficient cause why the said stipend so in arrear as aforesaid should not be paid and satisfied: we should proceed as by the said act we were empowered. And whereas you did wilfully neglect or refuse to attend at the said time and place, and we did, notwithstanding your absence, hear the complaint of the said *Arthur Hubbard*, touching the said stipend or allowance, and the non-payment thereof; and did thereupon determine, that the sum of 37*l.* 10*s.*, being the amount of stipend so in arrear as aforesaid, was justly due and owing to the said *Arthur Hubbard*; and that you, without lawful cause, wilfully neglected or refused to pay the same. Now we do therefore, under and by virtue of the before-mentioned act of parliament, monish and direct you the said *William Capel* to pay and satisfy the said *Arthur Hubbard* the aforesaid sum of 37*l.* 10*s.* due to him aforesaid. And we do further monish and direct you hereafter to pay and discharge such stipend quarterly, and also the said sum of 15*l.* yearly, as the same becomes due by virtue of our license as aforesaid; and to make a return to this our monition, into our registry, situate in *Godliman Street, Doctors' Commons, London*, within thirty days from the service thereof, pursuant to the said act of Parliament. Given, at *London*, the 4th day of *March*, in the year of our Lord, 1831, and in the third year of our translation.

“*John Sheppard*, Deputy Registrar.”

This last-mentioned monition was served on the plaintiff on the 9th *March*, 1831; and, on the 6th *April*, 1831, the plaintiff, by his proctor, duly made and filed in the registry of the Bishop's Court the following return thereto:

“In the Consistory Court of *London*.—*Watford* Vicarage.—On the 6th day of *April*, 1831, before the Worshipful *John Daubeny*, Doctor of Laws and Surrogate, in his chambers in *Doctors' Commons, London*, present—On which day, *F. H. Dyke*, the proctor for the Honourable

and Reverend *William Robert Capel*, the vicar of the vicarage and parish church of *Watford*, in the county of *Hertford*, and diocese of *London*, and by way of return to the monition bearing date the 4th day of *March* last, and served on his said party on the 9th day of the said month, monishing him to pay and satisfy the reverend *Arthur Hubbard*, clerk, the sum of 37*l.* 10*s.*, alleged to be due to him for half a year's stipend of 75*l.* *per annum*; and in future to pay and discharge such stipend quarterly, and also the sum of 15*l.* yearly, as the same becomes due; and thereafter to pay and discharge such stipend quarterly, and also the said sum of 15*l.* yearly, as the same becomes due; alleged that on the 12th day of *January*, 1830, the Lord Bishop of *London* issued a monition under his hand and seal, directed to the said Honourable and Reverend *William Robert Capel*, wherein it is alleged that it appeared to his lordship's own knowledge, that the ecclesiastical duties of the said vicarage and parish church of *Watford*, were inadequately performed by reason of the negligence of the said Honourable and Reverend *William Robert Capel*; and he was thereby, as asserted, under and by virtue of an act of Parliament made and passed in the fifty-seventh year of the reign of his late Majesty King *George* the Third, intituled 'An Act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintenance of stipendiary curates in *England*,' monished and required to nominate a fit person, with a stipend of not less than 75*l.* *per annum*, to be licensed by him the said Lord Bishop, to assist in performing the ecclesiastical duties of the said vicarage and parish church; and that if he should neglect or omit to make such nomination for the space of three months after being so required, the said bishop would proceed to appoint a curate according to the tenor of the said act; and the said *F. H. Dyke* de-

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nied that the ecclesiastical duties of the said vicarage and parish church ever were inadequately performed, or that the said Honourable and Reverend *William Robert Capel* was negligent in the performance thereof; but, on the contrary, he alleged, that, ever since the induction of the said Honourable and Reverend *William Robert Capel* to the said vicarage and parish church, to wit, in the year 1799, he the said Honourable and Reverend *William Robert Capel* hath been resident on his said benefice, and has performed the ecclesiastical duties of the said parish regularly and properly; and the said *F. H. Dyke* further alleged, that, by the 50th section of the said act of Parliament, it is enacted, that the requisition thereby directed to issue, in case of the inadequate performance of ecclesiastical duties, should be forthwith filed by the bishop in the registry of his court; and he alleged that the aforesaid requisition was not filed in the registry of the said lord bishop's court, as directed by the said act of Parliament; and that the said *F. H. Dyke*, being desirous of ascertaining on behalf of his said party, whether any such requisition had been filed as so directed, shortly after the said requisition was served on his said party, made inquiries, and from time to time continued to make inquiries in the said registry for that purpose; and was on all such occasions informed, that no such document had been filed in the said registry until the 2nd day of *December* last, when he was informed for the first time that the said requisition had been filed; and the said *F. H. Dyke* further alleged, that, on the 5th day of *July* last, he the said *F. H. Dyke* entered a *caveat* in the registry of the said diocese of *London*, against any license being registered, appointing a stipendiary curate for the said parish of *Watford*, yet that, notwithstanding the said *caveat*, and without any notice being given to him or his said party, a license bearing date the 2nd day of *July* last, under the hand and seal of the said bishop, was on or about the

25th day of *August* following received at the said registry, and which purported to appoint the said Reverend *Arthur Hubbard*, clerk, master of arts, to the office of stipendiary curate in the said parish church, and to assign to him the yearly stipend of 75*l. per annum*, to be paid quarterly, by the said Honourable and Reverend *William Robert Capel*; and also the further sum of 15*l. per annum*, in lieu of a house; and the said *F. H. Dyke* submitted that the said lord bishop is not by the said act of Parliament authorized to assign to the said Reverend *Arthur Hubbard* any sum of money in lieu of a house, he the said Honourable and Reverend *William Robert Capel* being resident at the vicarage house of the said parish; and the said *F. H. Dyke* further alleged, that, by the 70th section of the aforesaid act of Parliament, it is enacted, that every bishop who shall grant or revoke any license to any curate under this act shall and he is hereby required to cause a copy of such license or revocation to be entered in the registry of the diocese within which the benefice in respect whereof any such license should be granted or revocation made shall be locally situate; and an alphabetical list of such licenses and revocations shall be made out by the registrar of each diocese, and entered in a book and kept for the inspection of all persons upon payment of the sum of three shillings and no more; and a copy of every such license or revocation, with respect to any benefice, shall be transmitted by the said registrar to the churchwardens or chapelwardens of the parish, township, and place, to which the same relates, within one month after the grant or revocation thereof. And the said *F. H. Dyke* further alleged, that a copy of the said license was not registered in the registry of the said Lord Bishop of *London*, until on or about the aforesaid 25th day of *August*, although the same now appears in the register-book as having been registered on the 2nd day of *July*; and that no copy of the said license was transmitted or received at *Watford* by the churchwardens of the said parish, till the 28th day of the said

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month of *August*. And the said *F. H. Dyke* further alleged, that the said Reverend *Arthur Hubbard* has not, since his appointment, performed any duty in the said parish or parish church, nor was it requisite or necessary that he should do so, by reason that the said Honourable and Reverend *William Robert Capel*, as well before the issuing of such license as subsequent thereto, has himself regularly and properly performed the ecclesiastical duties of the said parish and parish church, as vicar thereof. And the said *F. H. Dyke* submitted to the law and judgment of the Court, that, by reason of the premises, the said monition has been improperly issued; and he prayed the Worshipful the Judge of this Court, to pronounce this the return of his said party thereto to be sufficient, and to dismiss the said Honourable and Reverend *William Robert Capel* from the said monition, and all further observance of justice therein."

On the 12th *April*, 1831, the following order was issued by the bishop, under his hand and seal, to the plaintiff:

"*Charles James*, by divine permission, Bishop of *London*, to the Honourable and Reverend *William*, otherwise *William Robert, Capel*, clerk, vicar of the vicarage and parish church of *Watford*, in the county of *Hertford*, and within our diocese and jurisdiction. Whereas by our monition, given under our hand and episcopal seal, bearing date the 4th day of *March*, last past, we did, under and by virtue of an act of Parliament made and passed in the 57th year of the reign of his late Majesty King *George* the Third, intituled 'An act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintainance of stipendiary curates in *England*,' monish and direct you, the said *William*, otherwise *William Robert, Capel*, to pay and satisfy the Reverend *Arthur Hubbard*, clerk, the sum of 37*l.* 10*s.*

being the amount of half a year's stipend, assigned to him by our license in such monition mentioned, and due to him on the 2nd day of *January* last, by virtue of our said license; and thereafter to pay and discharge such stipend quarterly; and also the further sum of 15*l.* yearly, assigned to the said *Arthur Hubbard* in lieu of a house, by our said license, as the same becomes due; and we by such monition required you to make a return to the same, within thirty days from the service thereof, pursuant to the said act of Parliament. And whereas the said monition was duly served upon you on the 9th day of the said month of *March*. And whereas a certain paper writing, purporting to be a return to our said monition, has been made on behalf of you, the said *William*, otherwise *William Robert, Capel*: And whereas such paper writing does not state such reasons as are deemed satisfactory by us for the non-payment of the said stipend. And whereas you the said *William*, otherwise *William Robert, Capel*, have not yet paid and satisfied the said *Arthur Hubbard* the said sum of 37*l.* 10*s.*, as monished and directed by our said monition; but that the same still remains due and owing from you to the said *Arthur Hubbard*; whereby it appears to us that you the said *William*, otherwise *William Robert, Capel*, in defiance of our said monition, have wilfully neglected or refused and do continue to neglect or refuse to pay the same. Now we do hereby, under and by virtue of the before-mentioned act of Parliament, order and require you the said *William*, otherwise *William Robert, Capel*, to pay and satisfy the said *Arthur Hubbard*, within thirty days after this our order, or a copy thereof, shall have been delivered or left in the manner required by the said act of Parliament, the aforesaid sum of 37*l.* 10*s.* due to him the said *Arthur Hubbard* by virtue of the above-mentioned license; and hereafter to pay and discharge such stipend quarterly, as the same becomes due, as also the said sum of 15*l.* yearly, assigned to the said *Arthur Hubbard*,

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in lieu of a house by our said license, as the same becomes due as aforesaid, in pain of the further proceedings directed by the said act. Given at *London*, the 12th day of *April*, in the year of our Lord 1831; and in the third year of our translation. “*John Sheppard*, Deputy Register.”

The said last-mentioned order was served on the plaintiff on the 15th of *April*, 1831; the plaintiff did not obey the same; and on the 16th *May*, 1831, the bishop issued a sequestration under his hand and seal, whereby he sequestered the profits of the said vicarage of *Watford*, and appointed the defendants to be the sequestrators. The following is a copy of such sequestration.

“*Charles James*, by divine permission, Bishop of *London*, To our beloved in Christ, *James Child* and *John Bruton*, jointly and severally, greeting: Whereas, we have lately issued our monition under our hand and episcopal seal in the words following, to wit, *Charles James*, by divine permission, Bishop of *London*, to the Honorable and Reverend *William Capel*, clerk, vicar of the vicarage and parish church of *Watford*, in the county of *Hertford*, and within our diocese and jurisdiction. Whereas, we did, on or about the 12th day of *January*, in the year of our Lord 1830, issue our monition (here the monition is set forth *verbatim*) which monition was personally served on the said *William*, otherwise *William Robert, Capel*, on the 9th day of *March* last: And whereas no satisfactory return was made to the said monition. And thereupon, to wit, on the 12th day of *April* last, an order also issued under our hand and episcopal seal in the words following, to wit, (here the order is set forth *verbatim*), which order was also personally served on the said *William*, otherwise *William Robert, Capel*, on the 15th day of the said month of *April*: And whereas it is represented to us that such order has not been complied with, and that the said

*William*, otherwise *William Robert, Capel*, hath not yet paid and satisfied the said *Arthur Hubbard* the aforesaid sum of 37*l.* 10*s.*, as monished and directed by our said monition and order, but that the same still remains due and owing from the said *William Capel*. We therefore, the bishop aforesaid, by virtue of the before-mentioned act of Parliament, have sequestered all and singular the fruits, tithes, and profits, and other ecclesiastical emoluments of the said vicarage and parish church of *Watford*, in the county of *Hertford* aforesaid, and within our diocese and jurisdiction of *London*, and to the aforesaid *William*, otherwise *William Robert Capel*, the vicar thereof, belonging or in anywise appertaining, and do sequester the same by these presents, and injoin you to publish or cause to be published this our sequestration so by us interposed to all and singular that are interested therein on such days and at such places as are proper and convenient in that behalf: and also ask for, collect, levy, and receive all and singular the said suits, tithes, profits, and other ecclesiastical emoluments whatsoever of the said vicarage and parish church of *Watford* aforesaid, and to the said *William*, otherwise *William Robert, Capel*, the vicar thereof, belonging, or in anywise appertaining; and the same so collected, levied, and received, to expose to sale, and sell for a sufficient price; and with the same so collected, levied, and received, to pay the said *Arthur Hubbard*, as curate of the said parish, the sum of 37*l.* 10*s.*, for half a year's stipend, assigned to him by our license as aforesaid, and now due, with all your costs, charges, and expenses, incurred, or to be incurred, in relation to this our sequestration, or any proceedings incident thereto. And we do hereby direct you to render a true and faithful account of the residue of what you shall have so collected, levied, and received, to us, or to our vicar general, his surrogate, or some other competent Judge in this behalf, when you shall be duly required so to do; and to do and discharge all other things

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needful and necessary in that behalf. And we do commit and grant unto you, the said *James Child* and *John Bruton*, jointly and severally, our power and authority by these presents, until we shall think fit to relax the same. In testimony whereof, we have caused the seal of our vicar general, which we use in this behalf, to be affixed to these presents. Dated, at *London*, the 16th day of *May*, in the year of our Lord 1831, and in the third year of our translation.

“ *C. J.* (L. s.) *London*.

“ *John Sheppard*, Deputy Registrar.”

On the 11th June, 1831, the defendants, as sequestrators, demanded and received from the executors of one *Robert Clutterbuck*, deceased, the sum of 5*l.* 13*s.*, being the amount of certain fees due to the said plaintiff, as vicar of the said parish of *Watford*, on the interment of the said *Robert Clutterbuck* in the church-yard of the said parish, and gave the following receipt, in writing, for the same.

“ Received, the 11th June, 1831, of the executors of the late *Robert Clutterbuck*, Esq., the sum of 5*l.* 13*s.*, for the burial dues on account of the Honorable and Reverend *William Capel*, as directed by the Lord Bishop of *London*, under the sequestration by us,

*James Child* }  
*John Bruton* } Sequestrators.”

The plaintiff, subsequently, and before this action was brought, required the defendants to pay the said sum of 5*l.* 13*s.* to him, which they refused to do.

The questions for the opinion of the Court were—

*First*, whether the bishop, under the circumstances before stated, had any authority by virtue of the act of 57 *Geo.* 3, c. 99, to appoint a curate?

*Secondly*, supposing him to have such authority, whether the license granted to Mr. *Hubbard*, dated 2nd *July*, 1830, was a valid appointment of him as curate, under the provision of the said act?

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*Third*, whether the bishop was authorized by the said act to enforce the payment of the stipend appointed to Mr. *Hubbard*, by monition and sequestration?

*Fourth*, whether the proceedings of the bishop were not void from irregularity?

The case was argued in this term by *Turner*, for the plaintiff, and *Platt* for the defendants; and afterwards by the King's Advocate for the plaintiff, and by Dr. *Dodgson* for the defendants.

The Court delivered their judgments at great length, and commented upon all the arguments used by counsel: it is therefore deemed proper to abstain from stating the arguments in detail.

LORD LYNTHURST, C. B.—We were extremely desirous, in consequence of the importance of this question, of having it argued in such a manner as to have every possible light thrown on it that the nature of the subject would admit of. It certainly has, both on the former and present occasion, been very satisfactorily argued; but, I confess, nothing that I have heard in the course of either the former or present argument, has altered the opinion I originally entertained with respect to the question. There is an authority given by the act of Parliament for a monition; and the question is, whether that authority, within the meaning and spirit of the act of Parliament, has been properly pursued. I am of opinion that it has not. It is unnecessary for me to read the 50th section of the 57 *Geo.* 3, out of which this question arises. But I will in the first instance say, I do not found my opinion on the construction of that clause, as to the question, whether it is confined to

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benefices having a plurality of churches and chapels; or, whether it extends also to benefices having only one. I do not think it necessary to give any opinion on the construction of the clause with respect to that point: the judgment I have formed proceeds entirely on a different ground. I have said that there is an authority given to the bishop by the 50th section of this act of Parliament, and that authority so given must be strictly pursued. The authority is, to decide upon affidavit, or upon his own knowledge, whether or not the duties of the parish have been inadequately performed in consequence of the negligence of the incumbent. The words of the act are these: "That, whenever it shall appear to the satisfaction of any bishop, either of his own knowledge, or upon proof by affidavit laid before him, that, by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese; or, the distance of such churches or chapels; or, the distance of the residence of such spiritual person serving the same from such churches or chapels; or any or either of them; or the negligence of the spiritual person holding the same; that the ecclesiastical duties of such benefice are inadequately performed;—such bishop may, by writing under his hand, require the spiritual person holding such benefice to nominate to him a fit person or persons, with sufficient stipend or stipends, to be licensed by him, to perform, or to assist in performing such duties; specifying therein the ground of such proceedings. And, if such spiritual persons shall neglect or omit to make such nomination for the space of three months after such requisition so made as aforesaid, then, and in every such case, it shall be lawful for such bishop to appoint a curate or curates, as the case shall appear to such bishop to require, with such stipend or stipends as such bishop shall think fit to appoint, not exceeding in any case in the whole the stipends allowed to curates by this act; nor, except in the case of negligence, exceeding one half the gross

value of the benefice; although the spiritual person to whom such churches or chapels shall belong shall actually reside or serve the same: provided always, that such requisition, and any affidavit made to found the same, shall be forthwith filed by the bishop in the registry of his Court. "Whenever it may appear to the bishop, either upon affidavit, or of his own knowledge"—that must appear as a conclusion, either from evidence before him, or from what he knows of his own knowledge. Now, let me consider in the first place, the first case which I have put—"Whenever it shall appear to the satisfaction of any bishop, either of his own knowledge, or upon proof by affidavit laid before him, that, by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese, or the distance of such churches or chapels from each other, or the distance of the residence of the spiritual person holding the same, that the ecclesiastical duties of such benefice are inadequately performed, in consequence of the negligence of the incumbent"—does not this import inquiry, and a judgment as the result of that inquiry? He is to form his judgment; it is to appear to him from affidavits laid before him: but, is it possible to be said that it is to appear to him, and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and in his property? That he is to come to that conclusion, without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence—without having an opportunity even of being summoned for that purpose? as in the present instance; there being no summons, for the motion was proceeded in immediately, without any intimation whatever from the bishop of his intention to proceed, to the party against whom that requisition proceeds. Now, if this be the case, with respect to that part of the act of

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Parliament where the proceeding is on affidavit, it appears to me as a necessary consequence, that, where the bishop proceeds, not on affidavit, but on his own knowledge, the same course of proceeding is necessary; because, a party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defence. On consideration, then, it appears to me, that, if the requisition of the bishop is to be considered a judgment, it is against every principle of justice, that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment: it says, "Whereas it appears to us, of our own knowledge, that the ecclesiastical duties of the said vicarage and parish church of *Watford* are inadequately performed, by reason of your negligence: we do therefore, under and by virtue of an act of Parliament, made and passed in the 67th year of the reign of his late Majesty, *Geo. 3rd*, intituled An act, and so forth, monish and require you to nominate to us a fit person, with a stipend of not less than 75*l. per annum*, to be licensed by us, to assist in performing the ecclesiastical duties of the said vicarage and parish church of *Watford*: further monishing you, that, if you shall neglect or omit to make such nomination for the space of three months after this requisition, we shall proceed to appoint a curate, according to the tenor of the said act." It is in form a judgment; it is in effect and consequence a judgment. It appears to me, therefore, considering the principles of justice, that this construction of the act could hardly be more necessary, if it had been absolutely required by the language of the act that a previous summons should be issued. But then it is said, that the party against whom judgment is pronounced has had an opportunity of being heard. It is true, that, after

the requisition has issued, upon a subsequent day, there was a mandate to shew cause—to attend before the bishop to shew cause. To shew cause to what? To shew cause why the requisition should not be cancelled—to shew cause why the nomination of a curate should not be rescinded? No, but to shew cause why a certain amount of salary should not be paid. It does not appear to me to follow at all as a necessary consequence, that, if the defendant had attended, he would have been allowed on that mandate to have shewn cause against the ecclesiastical judgment. The reason why I come to that conclusion is, that, after the mandate or monition issued, which monition is dated the 4th *March*, 1831, and recites the requisition and the previous proceedings; and to which monition an answer was put in on the part of the defendant, negating the charge preferred against the vicar, as follows:—“And the said *F. H. Dyke* denied that the ecclesiastical duties of the said vicarage and parish church of *Watford* ever were inadequately performed, or that the said Hon. and Rev. *William Robert Capel* was negligent in the performance thereof: but, on the contrary, he alleged, that ever since the induction of the said Hon. and Rev. *William Robert Capel*, to the said vicarage and parish church, he the said Hon. and Rev. *William Robert Capel* has been resident on his said benefice, and has performed the ecclesiastical duties of the said parish regularly and properly.” The answer given to that denial in the order subsequently made, is that such paper writing does not state such reasons as are deemed satisfactory, as it is alleged, for the non-payment of the stipend. It appears to me, therefore, that the subsequent proceedings were considered on the part of the bishop to relate only to the payment of the stipend; and that, if the party had appeared to the mandate, as he did afterwards to answer the monition, the original charge was considered a question which it was not competent for him to enter into, the only

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question being, as to whether or not, assuming the original requisition to be correct, the stipend was or was not payable. Then it was said in answer to the arguments urged at the bar, that the party had a right to appeal to the Archbishop. I apprehend the right to appeal to the Archbishop makes no difference in this case. Where there is an authority to pronounce a judgment, and an appeal is given from that judgment when it is pronounced, the party against whom the judgment is pronounced has a right to be heard on the original judgment: he has a right to be heard before the original judgment is pronounced, for the purpose of preventing that judgment from being pronounced; and the circumstance of its having been given makes in that respect, as I apprehend, no difference whatever. But if it is said further, an appeal is given—from what is it given? Not from the requisition, not from the judgment, but from the nomination. It is the requisition which states the judgment; it is not an appeal from that requisition: but, by the express words of the act of Parliament, it is an appeal from the nomination, which is a consequence of that requisition, and a consequence of the judgment pronounced on that requisition. Then, against what is the party to appeal. How does he know what is the offence imputed to him? The act of Parliament states that the requisition must contain the specific and particular grounds. I apprehend it is no compliance with that act of Parliament to say, that, following the words of that section, the ground of the proceeding is the inadequacy of the performance of the duties, in consequence of the negligence of the incumbent, but it must state the facts out of which that negligence proceeds, from which it is deduced, in order that the party when he comes to appeal, may know what in reality is the case meant to be adduced against him. It becomes more necessary when the proceeding is not founded on any charge contained in an affidavit, which might disclose to the party what the parti-

cular charge was which he was expected to meet. Now, in this case, it is not founded on affidavit, but on the knowledge of the bishop, which may be a knowledge in his own breast; and a party, upon an appeal, would not know what he was to meet, or be prepared adequately to make his defence. It does not appear necessary to proceed on that ground. Here is a new jurisdiction given—a new authority given: a power is given to the bishop to pronounce a judgment; and, according to every principle of law and equity, such judgment could not be pronounced, or, if pronounced, could not for a moment be sustained, unless the party in the first instance had the opportunity of being heard in his defence, which in this case he had not; and not only no charge is made against him which he had an opportunity of meeting, but he has not been summoned that he might meet any charge. On these grounds, I am of opinion that the proceedings are altogether invalid; for the rest of the proceedings which have been founded on this requisition, which is defective in the outset, cannot, in any part of them, be sustained.

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BAYLEY, B.—I am of the same opinion; and my opinion is founded on the insufficiency of the requisition; for, as it seems to me, every step proceeds on that; and if that foundation stone is removed, I think every thing built upon it, is to be considered as removed also. Before this act of Parliament, the bishop had clearly no right to proceed in the way this clause authorizes him to proceed; this clause gives him a special power, but it gives him a qualified power also: and if he does not pursue the terms in which that power is given, it seems to me that this clause gives him no protection. Now, I do not in this case found my opinion on the ground that the clause which applies to the negligence on the part of the incumbent, is confined to places where there is a plurality of churches. There is a peculiarity certainly in the language and the wording of the act,

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which may give great countenance to the belief that it is not applicable to places where there is a single church only; but I think that it is not at all necessary to combat with that difficulty in this case, or pronounce an opinion upon that question. The grounds on which my opinion is formed, are, that, in this case, it cannot be said judicially, it cannot be said with propriety, that it has appeared to the satisfaction of the bishop that the ecclesiastical duties of the parish were inadequately performed: and while this clause authorizes the bishop to issue a requisition, provided he shall specify in that requisition the grounds of his proceedings in this case, such grounds are not specified. The language of the act in the very beginning of the clause, seems to me to be important: "That, whenever it shall appear to the satisfaction of any bishop, either by his own knowledge, or upon proof by affidavit laid before him." Now, when can it with propriety be said the cause of complaint appears to the bishop, either upon affidavit, or on his own knowledge? Suppose one party to proceed by way of affidavit, and to lay an affidavit before him, would the fact of the affidavit being made, without calling upon the opposite party to shew cause against that affidavit, be a sufficient ground? In my opinion decidedly it would not. I might be able to shew that the party on whose affidavit the requisition was made, had been convicted of perjury, or was an infamous person, and that his affidavit ought not to be relied upon: I might meet it by counter affidavits, explaining and doing away with the effect of every act which had been mentioned and specified in that affidavit. Upon the general principles of law, it would have been essential, if the bishop had proceeded by way of affidavit, to have given the opposite party an opportunity of being heard. When the bishop proceeds on his own knowledge; I am of opinion also that it cannot possibly, and within the meaning of this act, appear to the satisfaction of the bishop, and of his own knowledge, unless he gives the party an opportunity

of being heard, in answer to that which the bishop states on his own knowledge to be the foundation on which he proceeds. It is not at all essential, in order to give effect to such proceedings, that there should be that delay which a suit in the Ecclesiastical Court would naturally produce. It would be quite sufficient if the bishop were to call the party before him, and to state to him the grounds on which he thought the duties were inadequately performed, by reason of his negligence; and he should have asked whether he had or had not any grounds on which he could answer that charge; but, is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate should have an opportunity of being heard? In our Courts of law, you cannot obtain a judgment against a party, without entering an appearance for him, so that it shall seem as if he had appeared. He either does actually appear, or else you enter an appearance for him, according to the act of Parliament expressly made for that purpose; and made because it is considered an invariable maxim of law, that you cannot proceed against a party without his having the opportunity of being heard, and without his appearing in Court, before a judgment shall be pronounced against him. In the case of proceedings before magistrates on summary conviction, if the conviction does not state either that the party was summoned, or that he appeared, the conviction is bad. If you remove a corporator, and it turns out that he was not summoned, however gross and flagrant his misconduct may have been, he is entitled to be restored; and I know of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard. There is a case of *The King v. Benn & Church (a)*, in which, where a warrant of distress, which is in the na-

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ture of an execution, had issued, not grounded on a previous summons, Lord *Kenyon* laid it down most distinctly as an invariable maxim of our law, that no man shall be punished before he has had an opportunity of being heard. Now, in this case, it is impossible, as it seems to me, to say, that the requisition is not in the character of a judicial proceeding. It does not call upon the party to shew cause, but, *transit in rem judicatam*, it requires him to do the act; and the period of time from which he is to do that act, is the period of time limited by the act of Parliament—giving him no further time to shew cause against the requisition being acted upon. And the appointment of a curate by himself; what is the effect of that? Why the effect of a curate being appointed by himself, or of an appointment of a curate by the bishop, is, for so long a time as the curate shall continue, to deprive him of a portion of the profits of his benefice; it is, to all intents and purposes, a deprivation from him, for so long a time as that curate shall continue, of 75*l.* a year if he shall continue under the requisition, or 90*l.* a year if he shall act under the appointment of the bishop. It cannot, therefore, in the first instance, be said to have appeared to the satisfaction of the bishop that this party had been guilty of negligence; and consequently that foundation, the first foundation on which this requisition issued, cannot be considered as having existed.

It is necessary also to specify in that judgment the grounds of the proceeding; and this is in the nature of a proviso, and is a qualification of the right of the bishop to act, or issue such requisition. Are the grounds of proceeding specified in this requisition? Suppose instead of acting on your own knowledge, you act on an affidavit—would an affidavit which had stated that the party had inadequately performed the ecclesiastical duties of his vicarage, be sufficient? As it seems to me, clearly it would not; it is not merely to specify the head or nature,

but it is to specify the grounds. You may have various grounds on which the clerical duties are negligently performed, in consequence of the negligence of the incumbent. He may do every duty in the most satisfactory manner, in the fullest way, in the church; but there may be a variety of parochial duties, every one of which may be negligently performed. He may perform a great many of the parochial duties most correctly, still he may be negligent as to some. Is it not right, in an affidavit against him, which is to be filed in the registry of the bishop's court, to give him an opportunity of saying it is not his fault; and to specify what is the nature of the charges you mean to make against him? If you had proceeded as you do in a citation, and the party had appeared, and then you had exhibited articles, the articles would point out what were the specific grounds of the proceeding; and such party would have an opportunity of being heard on those grounds. But here there is no specification whatever, and on that ground therefore, in addition to the others which I have already mentioned, it appears to me that the bishop did not pursue the restrictions with which this power was conferred on him: and consequently that the sequestration afterwards issued cannot be supported.

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VAUGHAN, B.—I entirely concur in the opinions of my Lord Chief Baron and my brother *Bayley* in this case; but, as it is a question of very great and extensive importance, affecting the interests of the Church generally, I shall take the liberty of offering my opinion on the few remaining questions which have been raised. However much we may regret the cause which has given rise to the present discussion, it has been a source of great satisfaction to hear to day that no improper motive is imputed to the parties; and it is obvious, as it appears to me, that every body must feel that the bishop is acting in the conscientious

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discharge of a great public duty. But, on the other hand, it is quite impossible to find fault with the resistance which has been made to this act on the part of the bishop by the gentleman who is the plaintiff in this case; because, to have acquiesced in this act of the bishop, would have been to admit something very like a stain upon his character. The case itself presents two considerations; and the first is, whether the bishop has any jurisdiction to appoint a curate in the event of the incumbent refusing to do so; and, if he has that jurisdiction, whether he has exercised it conformably to the act of Parliament which has given him power so to do. Now, I was the rather desirous of expressing my opinion upon the first branch, because I find that there is a clause in the act, namely, the 74th section, which says, “whenever any jurisdiction is given to the bishop, all concurrent jurisdiction shall cease.” I thought it as well, having looked attentively into the section, to state my opinion on that part of it; but, in doing so, I will just observe upon the relative situation of the parties at common law. No one will insist that the bishop has a right—indeed it has been conceded on both sides that no one has a right—to enter or obtrude upon a resident incumbent a curate *in invitum*, against his will; the bishop has no such power at common law; nor has it been contended that he has, unless that power has been conferred upon him by this particular section of the act of parliament, namely, the 50th section; therefore, it becomes a question whether the right of the resident incumbent is controlled by the terms of this particular section. Now, in referring to that section, I confess it appears to me to apply only to a case of plurality of churches or chapels. I think the whole context of the section implies that; for, it begins by saying, “that, whenever it shall appear to the satisfaction of any bishop, either of his own knowledge, or upon proof by affidavit laid before him”—What?—“that

*by reason of the number of churches or chapels* belonging to any benefice locally situated within his diocese, or by reason of the distance of such *churches or chapels* from each other, or by reason of the distance of the residence of the incumbent from such *churches or chapels*, or by reason of the negligence of the spiritual person holding the same churches or chapels." The whole of the language of the section goes on in the same way; "and, unless he shall appoint a curate, then it shall be lawful for such bishop to appoint a curate or curates as shall appear to such bishop to require; and such stipend or stipends as such bishop shall think fit to appoint, not exceeding in any case, in the whole, the stipend allowed to curates by this act, nor, except in the case of negligence, exceeding one half of the gross annual value of the benefice, although the spiritual person to whom such churches or chapels shall belong, shall actually reside, or serve the same." Looking at this section of the act of parliament, it is to be observed, that, before this time, there was no such instance, that I am aware of, either in the statute 12 *Anne*, or in the statute of 36 *Geo. 3*, or in the statute 53 *Geo. 3*, or in any section of any act, until the act in question; nor was any attempt ever made to obtrude upon an incumbent of a benefice a curate against his will. It appears to me that this is a power which ought, most unquestionably, to be construed strictly; and also, upon the best construction I can give to this clause, that it was not intended to authorize the bishop to appoint a curate in any case in which there was not more than one church or chapel annexed to that benefice. We are not called upon to announce our opinion upon the expediency of giving such power to the bishop, the mere opinion which we are called upon to give is, whether the bishop has such power. The parish here has upwards of five thousand inhabitants; and it is a parish five miles in extent: it, therefore, might be expedient to

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give the bishop a power, under those circumstances, to call upon the incumbent to supply such assistance as might, in the opinion of the bishop, be requisite. But that is not the question here; we are not called upon to pronounce an opinion upon that; but the question is, whether, within the terms of this act of Parliament, the bishop has the power to call upon the incumbent of a benefice to appoint a curate. It appears to me he has not that power, unless the benefice consists of more churches than one. But, independently of that question, whether he has jurisdiction or not—conceding that he has jurisdiction—is it possible to contend that the jurisdiction has been properly exercised? It is perfectly foreign to the administration of the English law to suppose, that, in a case where the consequences are highly penal, as they are in this case, for they affect the temporal and spiritual condition of this person, to suppose that he has this power, unless the party complained of has an opportunity of being heard. It appears to me, under all the circumstances, there having been no citation, that this proceeding operates in the nature of a judgment in the first instance; for, this requisition calls upon him to appoint a curate within a certain number of days; and, when those days expire, the time arrives at which the bishop claims the power, and exercises the power, of appointing the curate; and, to hold that he can have any such power, without giving the opposite party an opportunity of being heard, is totally foreign to every notion of the administration of justice. It will be also remembered, that, by this particular act of Parliament, the bishop is not to generalize the grounds of negligence, but he is called upon to specify distinctly the nature of the negligence, as in the nature of articles, by affidavit, in order that the other party may have the means of giving a specific answer—otherwise it would be materially injuring the character of this party without his having an opportunity of defending himself. Upon the

whole, it appears to me, upon the best construction which I have been able to put upon this section of the act of Parliament, that this jurisdiction has been improperly exercised.

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BOLLAND, B.—I am of the same opinion. And, unless this had appeared to me to be a case of great moment, I should not, of course, after what has been so ably said by my Lord Chief Baron and by my two learned Brothers who have preceded me, have said one word about it; but, I found my judgment upon three grounds, namely, that which my learned brother *Vaughan* has alluded to, the want of jurisdiction on the part of the bishop—and also upon the other ground taken by my Lord Chief Baron and Mr. Baron *Bayley*; and further upon the insufficiency of the requisition: therefore, I think it a case in which I should give reasons for pronouncing the judgment which I am about to give. Now, to take the first ground—namely, the want of jurisdiction on the part of the bishop—if I had considered this as an extra-judicial point, I should not have introduced it as a part of my judgment: but, as it goes to the jurisdiction of the bishop, and takes away all the ground from under him, I have thought it material to state that ground in delivering the judgment I am about to pronounce. The section of the act of parliament upon which this authority is said to be constituted, appears to me to apply solely to the case of a parish in which there are more churches or chapels than one. It has been asked, and very ingeniously put, by the learned Doctor who last addressed the Court on the part of the defendants—why need this have been done, if the circumstances had existed which enabled the bishop before to have done all he has claimed a right to do? Now, it appears to me that an answer may be given to that, namely, that, at the time this act of Parliament was passed, there were a vast number of new chur-

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ches intended to be built in different parts of this island; and it is very likely that it would appear right to the Legislature to insert in the act that power, to guard against cases in which it might be doubtful whether they were provided for by the law as it before stood. All that the act of Parliament says is this, "whenever it shall appear to the satisfaction of any bishop, either upon his own knowledge, or upon proof by affidavit laid before him, that, by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese, or the distance of such churches or chapels from each other, or the distance of the residence of the spiritual person serving the same from such churches or chapels, or any or either of them." I will confine myself to that, and consider the three first points upon which the bishop has a right to act—if upon his own knowledge it appears, or, if it appears upon proof by affidavit, that the number of churches or chapels in a parish (with which, recollect, he may not be acquainted, and therefore it must be necessary for him to be informed of it by others,) is so great that it is perfectly impossible for one person adequately to perform the duties of them, that then he shall have the right to appoint a curate. It then goes on further to say, "or if, by reason of the distance of the residence of the spiritual person serving the same from such churches or chapels, or any or either of them, the ecclesiastical duties of such benefice are inadequately performed;" he then has another ground to act. And, if the requisition stated that the clergyman's house is so situated that it is perfectly impossible for him to attend to the whole of the churches or chapels, so as to do the duties of them, the bishop shall then have the power of appointing a curate. It then goes on to state, "or if, by the negligence of the spiritual person holding the same, the ecclesiastical duties of such benefice are inadequately performed." Now, it has been attempted (but no authority has been

cited), it has been sought to separate these words from the rest of the section, so as to set up the jurisdiction of the bishop as to negligence, even in such a parish as the parish of *Watford* is, where there is only one church. I confess I cannot put such an interpretation on this clause. The words are, as I before stated "if it shall appear to the satisfaction of any bishop, either of his own knowledge, or upon proof by affidavit laid before him, that, by reason of the number of churches or chapels"—clearly limiting it to a parish and intending it to apply to a parish with a plurality of churches or chapels in it. And the 4th member of the section is that upon which the bishop's right is founded, "or the negligence of the spiritual power holding the same." It has been said that that would apply, but you must incorporate it altogether with the rest of the clause, and confine it to parishes where there is more than one church or chapel. It appears to me the words "holding the same" are put in contradistinction to the words "serving the same;" the words are "or the distance of the residence of the spiritual person serving the same from such churches or chapels," then you shall require a separate curate. Now, if I am right in my view of the act, it will take away, as I have before stated, the ground of any jurisdiction whatever, and of course what the bishop has afterwards done will fall to the ground also.

But, supposing, as my Brother *Vaughan* stated, that the view which he and I have taken of this clause is erroneous, I then come to the other ground, about which, in my mind, there cannot be a moment's doubt—as to the insufficiency and injustice, I do not say so in an offensive way, but injustice, even in point, not of form, but of substance, of the proceeding upon the face of the requisition. Now, what has been done by the bishop to the plaintiff? He has upon his own knowledge proceeded to condemn him; for, the requisition is to be considered in the

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nature of a conviction—he has proceeded to condemn him. I do not go the length of the learned King's Advocate, in admitting that a bishop may not, upon his own knowledge, be so perfectly well acquainted with the state of the parish as to be able sufficiently to judge whether the duties are adequately or inadequately performed; for, a bishop is easily made acquainted with the parish; and, if he knows as well as anybody else knows that it is of the length of ten miles, and that a new chapel or a new church has been built at the very extremity of it; why, that very circumstance will convince him, in the case of a very infirm incumbent, that he cannot get that distance twice a-day, as he most certainly ought to do; and the bishop may then of his own knowledge, be satisfied, and well satisfied, that the duties of that parish cannot be adequately performed. But, although he may know it of his own knowledge, does the law mean him to carry it any further than the knowledge upon affidavit? Because the knowledge is either from his own eyesight, or his acquaintance with the localities of the churches, or from other circumstances, or, in the case of affidavit, from the information of other parties. In such a case, he ought to have called the parson before him, and, having the party before him, he might have stated to him—"On my own knowledge, I do so and so—the churches are situated so and so—your infirmities are such, that it is quite impossible that the duties of a distant church can be adequately performed. Supposing the proceeding were by affidavit, he should have done the same; he should have cited him and stated to him—"I have received such and such affidavits—they have been shewn to me as the bishop of the diocese, in which certain facts are stated, complaining of your conduct in the interior of the church;" or have pointed out to him the distance as being represented to him to be such that the duties of the parish could not be adequately performed. Now, that I think was the first

step that it was incumbent upon the bishop to take, and, therefore, it appears to me to be a judgment upon a party who has not had the opportunity of being heard. But the statute goes further, the requisition is to specify the grounds of the proceeding. Can it be said that the requisition in this case does that, when it only says—"Whereas, it appears to us, of our own knowledge, that the ecclesiastical duties of the said vicarage and parish church of *Watford* are inadequately performed, by reason of your negligence?" This may arise from many causes, and the grounds should be stated on the face of the requisition, which calls upon the incumbent of the parish to appoint a curate, with a stipend, as required by the act of Parliament upon which this requisition proceeds. In that case, the original defendant might have appeared before the bishop, and he might have stated to him such reasons as would have induced him never to have proceeded further than the issuing of that requisition. The bishop might then have said—"I am satisfied with the explanation, and will withdraw my requisition;" and, therefore, the monition which was afterwards issued would never have been issued. For these reasons, it appears to me, that, upon the three grounds which I have stated (but upon the two last without any doubt whatever), though I certainly entertain no doubt of the first—the judgment ought to be for the plaintiff.

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Judgment for the plaintiff.

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*A.*, a complainant in Chancery, employed *B.* as his solicitor, during whose employment an irregular order to dismiss the bill on a certain day, unless publication passed, was obtained; before that day arrived, *C.* was appointed the solicitor of *A.*, and the bill having been dismissed because no step was taken by *C.*, an action was commenced against him for negligence, which was held to be maintainable, because he should have conformed with the order, or should, within the time, have moved to vacate it.

**T**HE *first* count of the declaration stated, that the plaintiff had employed one *H. R. Sylvester* as his solicitor, to institute and prosecute a suit in the Court of *Chancery*, for the plaintiff and his wife, against certain defendants therein named, for the purpose of establishing the will of one *Francis Lucas*, and for carrying the trusts thereof into execution, and for other purposes; and that, whilst *Sylvester* was acting in such employment, to wit, on the 2nd of *May*, 1831, the defendants in that suit had caused a notice of motion to be served on the clerk in court of the plaintiff, to dismiss the bill for want of prosecution, on the 5th; whereupon, *Sylvester* caused a replication to be filed to the answer of the defendants, and an undertaking to be given to speed the cause; and it was afterwards, to wit, on the said 5th day of *May*, &c., upon motion to the said Court, then and there ordered by the said Court, by an order, bearing date the said 5th day of *May*, that the plaintiffs in the said suit should go to commission in the then ensuing vacation, and give rules to pass publication in the then next term, and set down the said cause for hearing in *Michaelmas* Term; or, in default thereof, that the said bill of the said plaintiffs should stand dismissed, with costs, &c.; that *Sylvester* was afterwards discharged from his said employment; and that, whilst the suit was pending, and after the making of the said order, and before the several times limited for the several steps and proceedings in the suit therein specified, to wit, on the 11th of *May*, the plaintiffs retained the defendant as a solicitor, to carry on, conduct, and prosecute the said suit; and that the defendant had notice of the undertaking theretofore given, and of the said order: whereupon, it was the duty of the defendant to have taken the said several steps and proceedings in the said suit, on the part

of the plaintiffs, in the said order specified, within the times therein appointed and limited for taking the same respectively, and according to the course and practice of the Court; but that the said defendant, not regarding his said duty, did not nor would carry on or conduct and prosecute the said suit, from the time of his said retainer, with due and proper care, skill, and diligence; but, on the contrary thereof, acted therein carelessly, negligently, and unskilfully, in this, to wit, that he altogether neglected and omitted to take the said several steps and proceedings in the said suit, or any of them, on the part of the said plaintiffs, in the said order specified, within the respective times in the said order appointed and limited for the taking the same respectively, or according to the course and practice of the said Court: by reason whereof the bill of the said plaintiffs in the said suit was dismissed with costs as against the said defendants in the said suit; whereby the plaintiff was obliged to pay to the defendants a large sum, to wit, the sum of 60*l.*, for their costs of defence in the said suit, and also lost another large sum, to wit, the sum of 100*l.*, incurred and paid by the said plaintiff to the said *H. R. Sylvester*, for his costs and charges in and about the instituting of the said suit, and the conducting thereof, whilst he the said *H. R. Sylvester* had the conduct and management thereof, and acted as solicitor for the said plaintiffs as aforesaid; and the said plaintiff became and was rendered liable to be compelled by the said defendants in the said suit to pay to them another large sum, to wit, the sum of 100*l.* for their costs upon and about the said motion and order, and divers proceedings adopted by the said defendant, avowedly on behalf of the said plaintiffs in the said suit, for the purpose of restoring the same and discharging the said order for the dismissal of the said bill; and the said plaintiff also incurred divers other large expenses, amounting in the whole to a large sum, to wit,

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100*l.*, in endeavouring to make the said defendant pay the losses aforesaid.

The *second* count stated, that a suit in *Chancery* was instituted by the plaintiff and his wife for certain purposes, in which the plaintiff's wife was interested, and set out the order therein of the 5th *May* (as in the first count), and averred notice to the defendant of the said order: it then alleged a retainer to the defendant whilst the suit was pending, and before the said several times by the said order appointed and limited for the said several steps and proceedings in the suit; and that it became his duty to comply with and perform the terms of the order, according to the course and practice of the said Court; and averred as a breach, that he neglected so to do at the times when he ought so to have done, according to the terms of the order, and the course and practice of the Court; by means whereof the plaintiff's bill was dismissed with costs, and the plaintiff was forced to pay to the defendants in that suit a large sum of money for their costs of defence, and divers costs and expenses, &c., incurred in and about the instituting and prosecuting of the suit, and certain proceedings consequent thereon and relating thereto.

The *third* count was on a retainer by the plaintiff of the defendant, to conduct a suit in *Chancery*, theretofore instituted, with proper care, skill, and diligence; and averred the dismissal of the bill, with costs, through the carelessness, negligence, and unskilfulness of the defendant; and payment by reason thereof of costs, &c., as in the second count, by the plaintiff. The fourth count alleged a retainer of the defendant to continue a suit; and that it was his duty to inform himself of the state of the proceedings therein, and to take such steps as were requisite for the purpose of prosecuting the suit with effect; and averred that he omitted and neglected so to do, whereby the suit was dismissed, and costs were incurred and paid

by the plaintiff, &c. The defendant pleaded the general issue.

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The cause was tried before *Bolland*, B., at the sittings in *Middlesex*, after *Hilary* Term last, when the following appeared to be the facts of the case:—

On the 17th *July*, 1830, the plaintiff and his wife filed a bill in the Court of Chancery, against certain parties interested under the will of *Francis Lucas*, praying, amongst other things, that the will might be established and the trusts thereof carried into execution; that an account might be taken of the personal effects of the testator, which had come to the hands of *Ann Lucas* and *David James*, two of the defendants to that suit, the executors of the testator, and an inventory of the furniture, plate, &c., bequeathed for life to *Ann Lucas*; and that it might be declared that *Ann Lucas* had forfeited her life-interest therein; and that the residue of the testator's personal estate might be ascertained and invested, according to the trusts of the will. The defendants filed their answer in the early part of *November*, 1830, and on the 19th of *January*, 1831, a Chancery barrister, before whom a brief of the pleadings had been laid, gave an opinion, that it would be useless to proceed with the bill, for the purpose of establishing any forfeiture of *Ann Lucas's* life-interest; and, as to the other objects of the suit, that the plaintiffs might proceed with the same, for the purpose of having the accounts taken and the residue ascertained, at the risk of having to pay the costs of taking the accounts, in case any account had been rendered, if they could not shew that the accounts rendered were incorrect, or that more had since been received; and that the plaintiffs were clearly entitled to have other trustees appointed, and the stock invested in their names, and to have an inventory of the furniture, &c. taken, as directed by the will. In a subsequent opinion of the 28th of *April*, 1831, the same Chancery barrister advised, that, if the plaintiffs should waive the ques-

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tion of the forfeiture, or it should be determined against them, they would be fixed with the costs occasioned by raising that question, and also with the costs occasioned by praying for the accounts afterwards waived; but that, if the suit were continued for the purposes for which, in the former opinion, it was stated that the plaintiffs were entitled to continue it, the plaintiffs would be entitled to their costs out of the funds. The plaintiff employed *Sylvester*, as his solicitor, to commence the suit, who intrusted the management thereof to Mr. *Henson*, a clerk of another solicitor, and a friend of the plaintiff. On the 2nd of *May*, 1831, the defendants in the suit served a notice of motion for the 5th, to dismiss the plaintiffs' bill, with costs, for want of prosecution; and on the 4th, *Sylvester*, under the provisions of the 15th order of the Court of Chancery, caused a replication to be filed to the defendants' answer. On the last-mentioned day, *Henson* and the plaintiff saw the defendant, when *Henson*, as he said, informed him of the state of the suit, of the filing of the replication, and the notice to dismiss the bill; and it was agreed that *Henson*, in the name of Mr. *Sylvester*, had better give an undertaking to speed the cause. He accordingly did so on the 6th of *May*, and he handed over to the defendant a brief of all the pleadings, and the before-mentioned opinions. On the 5th of *May*, 1831, an order was made by the Vice Chancellor, for the plaintiffs to go to commission in the ensuing vacation, give notice to pass publication in the next term, and set down the cause for hearing in *Michaelmas* Term. On the 11th of *May*, the defendant wrote to the plaintiff, stating, that he had read the papers, and was ready to enter on the case; and, on the same day, after seeing the plaintiff, he wrote to the attorney for the defendants, and said, that he had taken up the papers in the cause, and proposed a meeting for the purpose of effecting a compromise. *Henson* likewise said, that he called on the defendant on that day, and

asked if he wanted any other papers than those he had already, offering, on his own responsibility, to furnish him with such as he might require, though *Sylvester's* bill had not been paid; when the defendant said, he did not wish for any other papers, as those he had were fully sufficient for his purpose. Two or three letters passed between the plaintiff and the defendant between the 11th and the 19th, in consequence of one of the defendants in the Chancery suit having refused to compromise; and some correspondence took place between the defendant *Sylvester, Henson*, and the plaintiff, upon the subject of the payment of certain items in *Sylvester's* bill, but no payment thereon was made until the 6th of *June*, when the defendant paid Mr. *Sylvester* 20*l.* on account. By the practice of the Court of Chancery, the 27th of *May* was the last day on which the plaintiff could cause the usual rules to produce and to pass publication to be given; and, except by complying with the terms of the order of the 5th of *May*, there was no mode of bringing the cause to a hearing, unless by consent of parties. The abandonment at the hearing of a cause of a part of the prayer of a bill, would make the plaintiff liable to the payment of a proportion of the costs of the suit in respect thereof; but the costs of the other parts of the prayer would not be affected, but would be paid out of the general fund. The defendant not having complied with the order, by giving the rules to produce, and pass publication, previously to the 27th of *May*, the bill was dismissed, and two motions to restore the bill, the one to the Vice Chancellor, and the other to the Lord Chancellor, were refused with costs; in consequence whereof, the plaintiff was called upon to pay the sum of 64*l.* 5*s.*, the whole costs on the dismissal of the bill, and was also rendered liable for the costs of the unsuccessful motions to restore the same.

The learned Judge put it to the jury, whether the defendant was engaged to conduct the cause, and at what

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time, expressing his opinion that he was retained on the 4th of *May*; and whether, if he was so retained he had been guilty of gross negligence so as to render himself liable to the action. The jury having found a verdict for the plaintiff—

*Follett* obtained a rule to set aside the same, and for a new trial, citing *Laidler v. Elliott* (a); and referring to an order of the Court of Chancery of the 23rd of *December*, 1830, (not in the printed orders), by which the defendants' motion to dismiss the bill for want of prosecution, was premature, and the order consequent thereon, irregular.

*Alexander* and *Tomlinson* shewed cause.—The only question is, whether the order of the 23rd of *December*, under which, it may be admitted, the motion to dismiss should regularly have been made, can be taken advantage of by the defendant. *Laidler v. Elliott* is distinguishable from this case; that was an action for not charging a defendant in execution in due time, whereby the plaintiff was prevented from obtaining the fruits of his judgment; and it was held that the attorney was not liable for negligence, inasmuch as such defendant had been improperly superseded before the two terms allowed by the rule of Court (*Hilary* Term, 26 *Geo.* 3) for charging the defendant in execution, had elapsed. It was clear, therefore, that the damage sustained by the plaintiff was not caused by the attorney's negligence, but solely by the mistake of the Judge, by whose order the defendant in the action was discharged. It was also said by the Court in that case, that the obscurity of the language of the rule would have been sufficient to protect the attorney, had the *superseas* been regular, as he would not have been guilty of

(a) 3 B. & C. 738.

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gross negligence. Here, however, the mistake of the Court is not the sole occasion of the injury to the plaintiff; neither is there any obscurity in the order, or any difference of opinion as to the course the defendant was bound to pursue, so soon as he was acquainted with that order. The complaint of the plaintiff is, that, through the defendant's negligence and inadvertence in the formal steps of the suit, the bill was dismissed, and costs incurred by the plaintiff; and the only question, therefore, is, whether these costs were occasioned through an error, such as a prudent and cautious attorney, bringing to the exercise of his profession reasonable diligence and skill, might commit—*Per Abbott, Lord C. J., Montrion v. Jeffereys* (a)—or whether the defendant used reasonable care in the conduct of the suit—*Reece v. Rigby* (b). It is quite clear upon the evidence, that the defendant was deficient in such skill, diligence, and care; and, consequently, that the plaintiff was entitled to recover the costs occasioned thereby.

*Follett and Butt, contra.*—The defendant was not bound, as alleged in the declaration, to take the steps and proceedings in the suit, except according to the practice of the Court of Chancery. Now, by the practice there prevailing, the motion to dismiss the bill, and the order thereupon, were made too early, and the damage sustained by the plaintiff was, therefore, consequent upon the error of the Court, and not the negligence of the defendant. *Laidler v. Elliott*, therefore, is directly in point; as there, the alleged negligence was, the not charging a prisoner in execution in time to prevent a *supersedeas* and discharge from custody; to which it was considered a sufficient answer, that the discharge of the prisoner by the Judge was premature and improper. In *Heathcote v. Wilkinson*, an

(a) 1 Ry. & Moo. 317—20.

(b) 4 Barn. & Ald. 202.

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action was brought for negligence in not delivering particulars of set-off within four days, pursuant to a Judge's order, whereby the defendant was prevented from giving certain items in evidence before an arbitrator; and, in consequence, the award was against the defendant, and he incurred the costs: the defence was, a mistake in the law by the arbitrator, in excluding the evidence which was admissible under the general issue, as the sum sought to be proved amounted to a payment, and, consequently, no notice of set-off was requisite. It was clear that the defendant was guilty of negligence in disobeying the order of the Judge; yet, Lord *Tenterden*, C. J., held, that the action was not maintainable, as the injury had been occasioned to the plaintiff by the mistake of the arbitrator, in assuming that the case was a case of set-off. That case is precisely similar to the present. The plaintiff, then, has sustained no damage by reason of the disobedience of the order, which is the only negligence with which the defendant is charged. It was also argued, that the cause was in a hopeless state when undertaken by the defendant; and, therefore, that no damage had resulted from his negligence.

Lord *LYNDHURST*, C. B.—I am of opinion that there should be no new trial in this case. The complaint made by the plaintiff in his declaration is, that the replication filed by *Sylvester* on the 4th of *May* was not followed up by the defendant *Cole*; and that, by reason of his neglect to proceed, in obedience to the order of the 5th of *May*, the plaintiff's bill was dismissed, and certain costs and charges thereby incurred. It is said, in answer to this, that the motion to dismiss the bill was, according to the existing practice of the Court, premature; and, therefore, that the order made upon that motion was irregular; but, as the order was a subsisting order, the defendant was bound, either to conform to it, or, if aware of the irregu-

larity, he might have applied to vacate that order. If he did not think proper to make that application, he was bound to act in conformity with the order; and I cannot say that he was not guilty of gross negligence in omitting to take such steps within the time limited by the order, as would have prevented the dismissal of the bill. But, it is then said, that, although it might have been the defendant's duty to act in obedience to the order; yet, that the action cannot be maintained, because the plaintiff could have obtained no advantage if he had proceeded further in the suit. The contrary, however, appears, as he was entitled to a part of the prayer of his bill, and to his costs in respect of that part, out of the general fund; and there is no ground for saying that this would have been no advantage. It is clear that *Cole* was retained to conduct the cause. All the evidence is one way upon that point; and I therefore think, that no grounds have been laid to induce the Court to grant a new trial.

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BAYLEY, B.—I am of the same opinion. I think that the question as to the retainer was properly put to the jury, as it involved in it a question of time prior to the 2nd of *May*; and that there was sufficient evidence of a retainer before that time, when the bill was in point of fact dismissed, to warrant the finding of the jury. There is another question, which is a question of law. It is said, that the order was an order irregularly obtained, and, consequently, that the defendant was not bound to obey it. The order, however, was, in fact made by the Court; and we are at liberty to assume that *Henson* and *Cole* did not know it was irregular; as, whether they did or not, it was in existence, and required the plaintiffs to proceed, at the peril of the bill being dismissed with costs. The disobedience of the order is that of which the present plaintiff complains, and is that from which he has received a damage. It is said, that disobedience to an irregular order

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does not entitle the plaintiff to recover, and that the defendant did all he could by the subsequent applications to restore the cause. This is not so; because he should have applied to vacate the order, instead of acting upon it, and suffering the period of time to elapse during which he could object to its validity. The defendant's disobedience then produced a damage to the plaintiff; and there is nothing in this case to take away any right he has to recover in respect thereof. *Heathcote v. Wilkinson* will not interfere with this decision; there, the question was, whether the negligence of the attorney in not delivering particulars of set-off precluded him from giving evidence of an item which turned out not to be properly a matter of set-off, but which the defendant was entitled to insist upon the allowance of, under the general issue; and, therefore, no damage legally resulted to the plaintiff in consequence of the neglect of the attorney to deliver particulars of set-off.

VAUGHAN, B.—I think there was ample evidence that the defendant was retained in the character of solicitor. Undoubtedly, to maintain this action, it was necessary that he should be found to have been guilty of gross negligence; but I think that the disobedience of this order, which it was his duty to attend to, amounted to such negligence; and, in every view of the case, that the verdict may be sustained. The cases cited to impeach the verdict are of a very different description. In *Laidler v. Elliott*, there was no negligence imputable to the attorney; but all the damage arose from the error of the Judge in making an order at chambers. In the other case, the error was that of the arbitrator; and, therefore, those cases go only to the extent of deciding, in conformity with reason and justice, that the attorney is not responsible for the error of a Judge or an arbitrator.

BOLLAND, B., concurred.

Rule discharged.

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MORGAN JONES v. W. JONES, Gent. one &amp;c.

**D**EBT on a joint and several bond, executed by *W. Jones, A. T. Jones*, both of whom were dead, and the defendant. The defendant pleaded *non est factum*, and the plaintiff joined issue on that plea, and prayed that the bond and condition might be enrolled. The condition, which was set out, recited indentures of lease and release (whereby a certain messuage and lands, with the appurtenances, before then assigned by *Lewis* to *W. Jones*, one of the deceased obligors, under the Lords' act (a), were assigned by the said *W. Jones* to the plaintiff), and was for the quiet enjoyment of the premises, and for the payment to the plaintiff of any loss or injury sustained by reason of the legal ouster of the plaintiff therefrom, or from any part thereof, by *Lewis*, or any other person. The plaintiff then suggested the two following breaches, under the statute 8 & 9 Will. 3, c. 11, s. 8. First, that, after the making of the said writing obligatory, to wit, &c. A. D. 1827, a certain action of dower was commenced and prosecuted in the court of great session for *Cardiganshire*, by one *Mary Lewis*, widow, who was the wife of the said *Lewis*, against the said plaintiff, for the recovery of the third part of certain messuages, tenements, and lands, which were of the said *M. Lewis*, her former husband; and thereupon, such proceedings were had, that afterwards, to wit, in the year aforesaid, the said *Mary*, by the consideration and judgment of the Court, recovered against the present plaintiff in the said action, and thereupon had full seisin and possession given her of the said messuage, tenement, and lands, in the said condition of the said writing obligatory mentioned as her dower. And the said (present) plaintiff was legally ousted out of the possession

To entitle a widow to damages in dower, it must be alleged and proved, that the husband died seised of an estate of inheritance.

(a) 32 Geo. 3, c. 28.

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of the same. And by reason of the said judgment and legal ouster of him the said plaintiff out of the possession of the said messuage, tenement, and lands in the condition of the said writing obligatory mentioned, he hath been obliged to pay and hath paid divers sums of money, amounting, &c. to 50*l.*, in satisfaction of the said dower of the said *Mary Lewis*, and hath sustained a loss or injury to a large amount, to wit, to the amount of 100*l.* Yet the said *W. Jones, T. Jones*, and *W. Jones*, (the defendant), have not, nor has either of them, nor have the heirs, executors, or administrators of any or either of them, paid and reimbursed unto the said plaintiff the said sum of money, being the loss or injury he hath sustained as aforesaid, or any part thereof, contrary to the form and effect of the said condition, &c. of the said writing obligatory. Secondly. That the costs, damages, and expenses suffered and incurred by the said plaintiff, by reason of the said action of dower so commenced and recovered by the said *Mary* against the said plaintiff, amounted in the whole to 100*l.* &c.; and the said plaintiff hath not been indemnified and discharged of and from the same, and the said *W. Jones, T. Jones*, and *W. Jones* (the defendant), have not, nor hath either of them, paid to the said plaintiff the said last-mentioned sum of 100*l.*; and the said plaintiff hath not held, occupied, and enjoyed the said messuage, tenement, and lands, in the condition of the said writing obligatory mentioned, free and clear, and freely and clearly acquitted, exonerated, indemnified, and discharged of and from the said costs, damages, and expenses, amounting to 100*l.*, suffered and incurred by the said plaintiff in the said action of dower so commenced and recovered by the said *Mary* against the said plaintiff as aforesaid, contrary &c. The venire was awarded to try the issue joined, and, if found for the plaintiff, to inquire of the truth of the breaches assigned, and assess the damages.

At the trial before *Bolland, B.*, at the Spring Assizes for

*Carmarthenshire*, to which county the venue had been changed, it appeared that *Lewis* was, in 1815, seised in fee of the premises in question, and assigned them under the Lords' act, 32 Geo. 3, c. 28, s. 13, to *William Jones* of *L.*, who took possession, and sold the estate in 1819 to the plaintiff in this action. The bond of indemnity sued on was then given to the purchaser by *W. Jones* of *L.*, the assignee, and by his attornies *T. Jones*, and *W. Jones* (of *A.*, defendant), as an indemnity against the claim of the son of the insolvent. The insolvent, *Lewis*, died in 1825, leaving a widow him surviving; who, after demanding an assignment of dower by the present plaintiff out of the premises in question, sued him in dower *unde nihil habet* in the *Cardiganshire* great sessions. The attorney in that action was the present defendant. The tenant in dower (the present plaintiff) pleaded, that, before the commencement of the suit, he was ready and willing, and then and there tendered and offered to the said (widow) her dower of the said hereditaments and premises, with the appurtenances; to receive which she wholly refused: and he further said that he was still ready and willing to render to the said (widow) her dower of the said hereditaments and premises, and rendered the same there in court to the said (widow). The judgment signed thereupon was in the following form: " And because the said (widow) doth not deny the plea of the said tenant (the present plaintiff), therefore it is considered that the said (widow) recover against the said (tenant) her seisin of the third part above demanded, with the appurtenances, to be held by her in severalty, by metes and bounds; and the said *M. J.*, the tenant, in mercy, and so forth: And thereupon the said (widow) saith that *M. L.*, her late husband, on 1st *January*, 1824, died seised of the tenements aforesaid in his demesne as of fee, and prays a writ of &c. to be directed to the sheriff of the county of *C.*, as well to give her full seisin of the third part aforesaid, with the appurtenances, to be held by her in severalty, by metes and bounds, as to inquire how

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much the third part of the tenements aforesaid may be yearly worth according to the value thereof, and also what damages the said widow has sustained on occasion of detaining the dower aforesaid, beyond the value aforesaid, from the commencement of this suit until the award of the said inquiry, as also for her costs and charges by her about her suit in this behalf expended. The writ of seisin and inquiry having issued, the inquisition found by the jury was, that the said *M. Lewis* (the deceased husband) died on 1st *June*, 1825, at &c., having, during his intermarriage with the said widow, been seised in his demesne as of fee simple of the tenements aforesaid; and the said tenements were, and ever since his decease have been, of the yearly value of 9*l.* beyond all reprises: and that nine months have elapsed since the demand of dower by the said widow; and that the said widow, sustained damages by reason of her dower to the amount of 2*l.* and for her costs in that suit, the sum of 40*s.*: therefore it is considered that the said widow recover against the said tenant (the present plaintiff), as well her damages of 2*l.* sustained by reason of the detention of her said dower, as also the sum of 40*s.* for her costs by the inquisition aforesaid found. The widow was put in possession of a third part of the premises in question. The plaintiff obtained a verdict on the plea of *non est factum*, and the damages were assessed on the first breach at 30*l.* for four years and a half arrears of dower; and on the second for 29*l.* 14*s.* 6*d.*, being for the damages and costs paid by the plaintiff in the action of dower. The learned Baron gave leave to the defendant to move to reduce the verdict by deducting the latter sum.

In *Easter Term*, *E. V. Williams* obtained a rule accordingly, against which—

*John Evans* and *Whitcombe* shewed cause.—The defendant seeks to reduce the verdict, by deducting the amount of the damages and costs paid by the plaintiff, who was

the tenant in the action of dower; or so much of the costs as were incurred after the inquiry was awarded. It is objected, that the demandant was deprived of her right to recover damages under the statute of Merton, 20 *Hen.* 3 c. 1, and therefore was not entitled to costs by the statute of *Gloucester*, 10 *Ed.* 3, in consequence of the plea of *tout temps prist*. This, however, is not a plea of *tout temps prist* sufficient to deprive the widow of her damages, as it does not state that the tenant hath been always ready to render dower, from the death of her husband, up to the commencement of the suit (a). But, even if this were a plea of *tout temps prist*, the demandant would still have been entitled to damages from the commencement of the suit to the award of the writ of inquiry (b).

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*Secondly*, the damages should be computed up to the time of taking the inquisition—*Thynne v. Thynne* (c), *Walker v. Nevil* (d). *Penrice's* case was determined on another point, and therefore is no authority *contra*.

*Thirdly*, although the inquisition does not state that the husband died seised, but merely his seisin during coverture, yet it must be intended that the seisin continued to the time of the husband's death, as the writ of seisin and inquiry are founded on the averment by the widow, that the husband died seised. But the want of such an allegation is not material, as it is not usual to insert it in a writ of dower *unde nihil habet*—*Williams v. Gwynne* (e), and it is not clear that the widow would be deprived of damages, even if the husband did not die seised; for, in Roscoe on Real Actions, 509, n. (i), it is said, "that, though the husband do not die seised, yet, if the wife demand her dower, she may recover damages from the time of the refusal." On this authority,

(a) Co. Litt. 326; Richardson's Pract. C. P. 5th ed. 509.

(b) 2 Wms. Saund. 44 d; cited 1 Richardson's Pract. 5 Ed. 509; *Penrice's* case, Barnes, 234.

(c) Trin. 1649; Hal. MSS.

(d) 1 Leon. 56; Harg. Co. Litt. n. 4, 32, b. 98.

(e) 2 Saund. 43; Register fo. 170; cited n. 1, ib.

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therefore, the assessment of damages by the jury for the time elapsed since the demand of dower, is correct; but, admitting the legal objections to be good, it is still questionable whether it is competent to the defendant to resort to such a defence, as he was the attorney for the plaintiff; and, if the award of damages and costs was improper, it was occasioned by his own laches and misconduct.

*E. V. Williams, contrà.*—The widow is not entitled to damages and costs, on two grounds—*first*, by reason of the plea—*secondly*, by reason of the omission of an allegation in the inquisition, that the husband died seised. The *plea* is, in substance, a plea of tender; and, although it might be bad on demurrer, it is made good by the demandant's confessing and taking judgment on it. [*Bayley, B.*—The demandant only confesses what is alleged, and not that the tenant has always been ready. Tender alone does not exonerate, unless the tenant has always been ready to render the land; and this plea does not state that he was ready to render the land at the proper time. It might be, that the tender was made when she was entitled to damages, and, if so, what remedy would she have had for the damages, if she had then taken the land?] The class of persons who, by the statute of Merton, are to pay damages, are those who are to be amerced for the deforcement, for, it is expressly laid down, that, wherever the tenant pleads *tout temps prist*, and the demandant takes judgment immediately, then there shall only be recovery of seisin, *et nihil de misa, quia venit primo die*; but, if the demandant would have damages, she may aver that she requested her dower, and the tenant did not endow her; and that the judgment for damages and value shall wait till the issue is tried (*a*). From *Rastall's Entries*, fol. 228, it appears, that “*de misa*,” is only an abbreviation

(*a*) Hal. MSS., Harg. Co. Lit. 33 a., n. 199.

of "*de misericordia*." *Penrice's* case only applies to the extent of the damages, and the remark in *Harg. Co. Lit.* n. 198, 32. b, that the judgment intended by the statute of Merton, is not the first, but the second judgment, is referable only to a writ of inquiry upon the *grand cape*.

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*Secondly*, it is clear that the widow can recover damages in dower only where the husband dies seised (a); and that such seisin must be suggested upon the record, was admitted by *Reeve (arguendo)*, in *Kerry v. Kent* (b). There is here no suggestion or confession of this fact upon the record, but the finding of the jury that the husband was seised "during his intermarriage," rather excludes the inference of seisin at the time of his death.

BAYLEY, B.—I am of opinion that this rule must be made absolute to reduce the damages to 30%. If the case stood merely upon the objection that the party had made a tender, and had been ready to assign the dower, I should have thought that the demandant, by the way in which this was pleaded, would not have been deprived of the right to recover damages, because I take that right to be this—"You, the tenant in dower, are to be at all times ready and willing to assign, and unless you are, the widow is entitled to recover damages." Now, in this case, it is not positively stated that he was so ready and willing, at least that point is left questionable upon the pleas.

Upon the second objection, however, *viz.* that it is not alleged that the husband died seised, I am not able to get over the difficulty the statute of Merton presents. The words of the statute are, "Whoever deforceth widows of their dowers of the lands whereof their husbands died seised, and that the same widows after shall recover by plea, they that be convicted of such wrongful deforcement shall yield damages to the same widow; that is to say, the value of the whole dower to them belonging, from the time

(a) Co. Lit. 32. b.; Dy. 284 a.

(b) Lord Raymond, 1384.

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of the death of their husbands, unto the day that the said widows, by judgment of the Court, have recovered their seisin thereof, and the deforcers nevertheless, shall be amerced at the king's pleasure." Now, at the common law, the widow was entitled to no damages; and this statute, in terms, gives damages only in those instances where the husband dies seised; and when we come to see what was the language of the earliest treatises of those lawyers who wrote nearest to the period of time when the statute passed, we find it laid down in the books, that these were the instances to which damages were confined. In *Coke Littleton*, 32. b, it is said—"She shall recover damages only where her husband dies seised, that is to say, of the freehold and inheritance; for, albeit the husband, before the title of dower, had made a lease for years, reserving a rent, the wife shall recover the third part of the reversion with a third part of the rent and damages; for, the words of the statute are, "*de quibus viri sui obierunt seisiti.*"

The like rule is said to be in conformity with the practice and precedents in the *Common Pleas*. In *Easter Term*, 11 *Eliz. Dyer*, 284 a, and in the note 198 *Co. Litt.* 32, Mr. *Hargrave* gives a passage from Lord *Hales's* manuscript, explanatory of the language of the statute—"First, what shall be said to be a dying seised: husband makes feoffment to the use of himself for life, remainder to his son in tail, and dies seised; the wife shall not have damages, because he doth not die seised of the inheritance, which descends to the son; and, therefore, finding that the husband dies seised, without saying of what estate, is ill:" therefore, it is not sufficient that the widow shew the husband died seised, but, it must also be alleged, that he died seised of an estate of inheritance. I am, therefore, of opinion, that, according to the strict rule, there ought to have been no damages; because, it is not shewn that the husband died seised.

It has been objected, that, as this point was not raised

at the trial, it ought not now to prevail; but, as it would be of no use to send the case down to a new trial, the rule may be made absolute. An objection has also been made, that it is not competent for the present defendant to say that the damages were improperly recovered, as he was the attorney for the present plaintiff, the tenant in the writ of dower. Although an attorney is bound to bring to the conduct of a cause all the knowledge requisite for a fair and skilful conduct of it, it is not essential that he should understand every nice and difficult question of law that may arise. For gross negligence he is answerable; and that question may be raised in an action for negligence. But, the attorney here, as it seems to me, is not blameable for not knowing the nicety of the law; nor do I think we can visit him with the costs that might be recovered back by a writ of error.

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BOLLAND, B.—I agree in opinion upon the main point, that it does not appear upon the face of the record that the husband died seised; and, consequently, that the widow was not entitled under the statute to recover damages. The finding of the jury might, perhaps, be construed to amount to a finding that the husband died seised; but, at best, it is equivocal, and, therefore, it is not fit that we should give it that interpretation. If the jury did so find, it would have been easy to draw up the judgment according to the form of the allegation of seisin made by the widow: instead of which there is almost a studied departure from this form, in stating that the husband died on the 1st of *June*, having “during his intermarriage” been seised.

GURNEY, B., concurred.

Rule absolute to reduce the verdict to 30%,  
the costs of the rule to be borne by each  
party respectively.

*Exch. of Pleas,*  
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ANSELL v. ROBSON and Another, Assignees, &c.

A coach maker who was tenant from year to year of certain premises, and had several coaches on hire, became bankrupt, and his assignees entered upon the premises to keep the coaches in repair in pursuance of the bankrupt's contracts; in *August*, the bankrupt's effects were sold and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the *Michaelmas* following. In an action by the landlord for a quarter's rent due the *Christmas* following—*Held*, that the assignees were liable.

**ASSUMPSIT** against the assignees of a bankrupt for use and occupation, to recover one quarter's rent, due at *Christmas*, 1831, for premises let by the plaintiff to the bankrupt.

At the trial before *Gurney*, B., it appeared that the bankrupt had carried on an extensive business as a coach manufacturer, and at the time of the bankruptcy, on the 9th of *March*, 1831, had upwards of three hundred coaches let on hire, under contracts. The assignees made use of the premises in question for the purpose of continuing the works and to keep the coaches in repair, pursuant to the terms of the contract; and, on the 26th of *March*, the day after the assignment, half a year's rent was paid under a distress. On the 15th of *August*, a sale took place, and on the 17th the assignees sent the key of the premises to the bankrupt, but they paid rent up to *Michaelmas*. The learned Judge directed the jury to find for the plaintiff, if they were of opinion that the defendants had taken possession of the premises with a view to a beneficial occupation; and the jury having accordingly found a verdict for the plaintiff—

*Hutchinson* moved for a new trial, submitting that the defendants were not liable, inasmuch as there was no actual occupation from *Michaelmas* to *Christmas*, and no contract for a tenancy; and that their acts would not have amounted to an acceptance of the term, if the bankrupt had held under a lease, but merely to an experiment for the purpose of ascertaining the value of the premises. If liable here, they would be equally so had they only gone on the premises for one day.

Lord LYNDEHURST, C. B.,—That would have been equi-

vocal; but, if assignees go on the premises for the purpose of taking possession, and actually take possession, that is sufficient to bind them to take the premises. A tenancy from year to year, until it is terminated, is the same as a lease. The interest of the bankrupt vested in the defendants; and it was expressly found by the jury that they took possession and occupied with a view to benefit the estate; a finding perfectly consistent with the evidence.

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Rule refused.

WILLIAMS v. JONES.

THE defendant being in the custody of the Sheriff of *Carnarvonshire*, in the county goal, at the suit of a different plaintiff, surrendered to a commission of bankrupt which was worked in that county. He was now brought up under a writ of *habeas corpus ad satisfaciendum* issued by the present plaintiff, in order to be charged in execution.

Where a defendant is in a county gaol, the plaintiff is not entitled as of right to a writ of *habeas corpus ad satisfaciendum*, with a view to remove him to the custody of the Warden of the *Fleet*. The issuing of such a writ is discretionary with the Court.

*R. V. Richards*, for the petitioning creditor, moved that he might be remanded, and that the costs of his removal and return should be paid by the plaintiff.

*J. Jervis* contended that the plaintiff was entitled to charge a defendant in a county goal in execution, either by lodging a *capias ad satisfaciendum* with the sheriff, or bringing up the defendant by *habeas corpus ad satisfaciendum*, in order to remove him into the custody of the Warden of the *Fleet*. He cited *Dax's Practice*, 109—*Tidd's Practice*, 364.

[*Bayley, B.*—Have you any authority which says you have a right to proceed by *habeas corpus*? The proceed-

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ing by *capias ad satisfaciendum* is more obvious, and more convenient.]

In *Owen v. Owen* (a), it was not disputed that a plaintiff might elect which writ he would resort to; and the only question raised was whether the delivery of a *ca. sa.* to the Sheriff completed the execution, so as to preclude the plaintiff from subsequently proceeding by *habeas corpus ad satisfaciendum*.

BAYLEY, B.—I think that the issuing of this writ is an act within the discretion of the Court, and therefore, that, if they had been apprised when it was applied for, that the party was in a distant county goal, and that the only object was to charge him in execution and commit him to the custody of the Warden of the *Fleet*, they would not have granted it. In the exercise of a sound discretion, the Court will consider the circumstances under which they are called upon to grant the writ, and, looking at them in this case, it is clear that it is writ which the plaintiff ought never to have asked for, as he might have charged the defendant in execution as effectually in the Court below by a writ of *capias ad satisfaciendum* lodged with the sheriff. The writ, then, has improperly issued, and the defendant has a right to be remanded. I cannot help thinking that it would be an oppressive act in a case like this to allow such a writ to issue, and a great hardship to open the prison of this Court to all prisoners in the county prisons, at the option of execution creditors.

The prisoner was—

Remanded.

(a) 2 B. & Ad. 805.

*Exch. of Pleas,*  
1832.

DIXON *v.* WIGRAM.

**COVENANT** on a mortgage deed. On a rule to shew cause why the plaintiff should not assign and reconvey the mortgaged premises, and deliver up the mortgage deeds, on bringing the principal money, interest, and costs, into Court, and why proceedings should not be stayed, it appeared that the plaintiff who was first mortgagee, had received a notice from a second mortgagee of his interest, and had been desired not to deliver up the deeds.

A first mortgagee brought an action on the covenant in the mortgage deed, having received notice from a second mortgagee not to deliver up the deeds. The mortgagor applied to the Court to compel the plaintiff, under the stat. 7 Geo. 2, c. 20, to reconvey the premises upon payment of the principal, interest, and costs; and the Court held it to be a case within the statute, and made the order.

*Alexander* shewed cause, and contended that the case was not within the statute 7 Geo. 2, c. 20, first, as the action was not in ejectment or "on a bond for payment of the money secured by the mortgage, or performance of the covenant therein contained;" and, secondly, as the second mortgagee did not consent to the delivering up of the deeds, and, therefore, might have his remedy against the plaintiff, after notice, in a Court of equity.

*Beames, contra*, submitted that the case was clearly within the intention of the act, which was remedial and was passed to save the delay, trouble, and expense of resorting to a Court of equity; that the second mortgagee could not call the plaintiff to account in equity, unless he were guilty of some fraud or negligence in his character of trustee; and that the interest of the second mortgagee could not be compromised, as a note of the existence of his interest might be indorsed on the deed, which would operate as ample notice to a subsequent incumbrancer. He cited *Besthen v. Street* (a), where the Court interfered in an action of covenant, *Pickering v. Truste* (b), and *Banks v. Brand* (c), as shewing that the Court possessed

(a) 8 T. R. 326.

(b) 7 T. R. 53.

(c) 4 M. &amp; S. 525.

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and would exercise an equitable jurisdiction, in staying proceedings where a defendant offered to do all that justice required.

The Court said the case was within the statute, and, as to the second point, that the second mortgagee would be in no danger, as several modes might be adopted to prevent any injury arising to him in consequence of the interference of the Court.

Rule absolute.

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## IN THE EXCHEQUER CHAMBER.

*[In Error from the Court of K. B.]*

GURNEY v. GORDON and Another.

The costs occasioned by a frivolous and vexatious election petition, may be recovered under the stat. 9 Geo. 4, c. 22, ss. 57, 69, against one of several petitioners.

**D**EBT upon the statute 9 Geo. 4, c. 22. The declaration stated that the defendant below (*Gurney*) was indebted to the plaintiffs, under and by virtue of a certain act of Parliament made and passed in the ninth year of the reign of his late Majesty, *George* the Fourth, to consolidate and amend the laws relating to the trial of controverted elections or returns of members to serve in Parliament, in the sum of 1260*l.* 10*s.* 8*d.*, for the costs and expences incurred by the plaintiffs in opposing the petition of the said defendant, and one *Charles King* Esq., complaining of an undue election and return for the Borough of *Tregony*; and to be paid by the said defendant to the plaintiffs when he, the defendant, should be thereunto afterwards requested: whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, and by virtue of the said act, an action had accrued to the said plaintiffs, to demand and have of

and from the said defendant the sum of 1260*l.* 10*s.* 8*d.*, parcel of the sum, &c. The declaration also contained counts for money paid, money lent, money had and received by the defendant below to the use of plaintiff below, and upon an account stated. The plaintiffs below had judgment upon *nil dicit*, and entered a *remittitur damna* except as to 1260*l.* 10*s.* 8*d.* (a).

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(a) By the 57th 60th and 63rd sections of the statute referred to in the declaration (9 G. 4, c. 22,) it is enacted, "That, whenever any committee appointed to consider the merits of any petition complaining of an undue election or return, or of the omission to return any member or members to Parliament, shall report to the House with respect to any such petition (except as is hereinbefore excepted) that the same appeared to them to be frivolous or vexatious, the party or parties, if any, who shall have appeared before the committee in opposition to such petition, shall be entitled to recover from the person or persons or any of them, who shall have signed such petition; the full costs and expenses which such party or parties shall have incurred in opposing the same, which costs and expenses shall be ascertained in the manner hereinafter directed." (Section 60.) "The costs and expenses of prosecuting or opposing any petition presented under the provisions of this act, and the costs, expenses, and fees which shall be due and payable to any witness summoned to attend before such committee, or to any clerk or officer of the

House of Commons, upon the trial of any such petition shall be ascertained in manner following, that is to say, on application made to the Speaker of the House of Commons, within three months after the determination of the merits of such petition, by any such petitioner, party, witness, or officer as before mentioned, for ascertaining such costs, expenses, or fees; the speaker shall direct the same to be taxed by two persons, of whom the clerk or one of the clerks assistant of the House, shall always be one, and one of the following officers, not being a member of the House, shall be the other; that is to say, Masters in the High Court of *Chancery*, clerks in the Court of *King's Bench*, Prothonotaries in the Court of *Common Pleas*, and clerks in the Court of *Exchequer*; and the persons so authorized and directed to tax such costs, expenses, and fees, shall, and they are hereby required to examine the same, and to report the amount thereof, together with the party liable to pay the same, to the Speaker of the said House, who shall upon application made to him deliver to the party or parties a certificate signed by himself, expressing the

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*Archbold*, for the defendant below.—It appearing on the record that the petition was instituted by *Charles King*, as well as by the defendant below, the action should have been brought against them jointly, and not against *Gurney* alone. By the statute the defendant must suffer judgment by default, and has no opportunity of taking this objection except in error.

*Sed per Curiam*.—By the 57th section the party who shall have appeared before the committee in opposition to the petition, is entitled to recover from the person or persons, or any of them, who shall have signed the petition, the full costs and expenses incurred in opposing the same;

amount of the costs, expenses, and fees allowed in such report, together with the name of the party liable to pay the same, and such certificate so signed by the Speaker, shall be conclusive evidence of the amount of such demands in all cases, and for all purposes whatsoever; and the witness, officer, or party claiming under the same shall upon payment thereof give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same." (Section 63.) "It shall and may be lawful for the party or parties entitled to such costs and expenses, or for his, her, or their executors or administrators, to demand the whole amount thereof so certified as above, from any one or more of the persons respectively who are hereinbefore made liable to the payment thereof in the several cases hereinbefore mentioned; and, in case of non-payment thereof, to recover the same by action of

debt, in any of his Majesty's Courts of Record at *Westminster*; in which action it shall be sufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them in the sum to which the costs and expenses ascertained in manner aforesaid shall amount by virtue of this act, and the certificate of such amount so signed as aforesaid by the Speaker shall have the force and effect of a warrant to confess judgment; and the Court in which such action shall be commenced, shall, upon motion, and on the production of such certificate enter up judgment in favour of the plaintiff or plaintiffs named in such certificate for the sum specified therein to be due from the defendant or defendants in such action, in like manner as if the said defendant or defendants had signed a warrant to confess judgment in the said action to that amount.

and, by the 63rd, to demand the whole amount thereof from any one or more of the persons liable. It is impossible to doubt that the plaintiff may, if he chooses, confine his suit to one.

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Judgment affirmed.

DOE *d.* KNOCKER *v.* RAVELL and Others.

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UPON the trial of an ejectment, before *Tindal*, C. J., at the last *Kent* Assizes, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case:—

A testatrix, after a preamble, "as for such temporal estate as God hath given me, I give, devise, and dispose of it in the following manner," gave to *J. R.* a house, &c., to come into possession at the age of eighteen, and to *S. R.* two other houses, &c. (without using any express words to pass the fee), and the residue of her estate, which was limited by enumeration to personalty: she also gave to *S. R.* the rent of the house before given to *J. R.* until he was eighteen, and, in the event of his death before that age, directed that all that was left to him should descend and go to *S. R.*:—*Held*, that *S. R.* did not take an estate in fee in the two houses.

*Margaret Ravell*, being seised in fee of several messuages at *Postling*, made her last will and testament in writing, dated the 6th *June*, 1780, duly executed to pass real estates, whereby, after directing the particulars of her burial, she gave and devised as follows:—"And as for such temporal estate as God hath given me, I give, devise, and dispose of it in the following manner—*First*, I give and bequeath to *John Ravell*, the younger, (to come into his possession as soon as he arrives at the age of eighteen years), all that messuage or dwelling-house, together with the garden, backside, and appurtenances thereunto belonging, as also the right of commonage for, and cow lees on *Postling Lees*, which said premises are situate in *Postling* aforesaid, and are now in the tenure or occupation of *John Chaplin*, or his assignees. All which said premises I do hereby give *John Ravell* the younger.

"Item, I also give and bequeath to my nephew, *John Ravell*, the elder, the sum of 25*l.* of principal money, and all interest due thereon at my decease; which said sum of 25*l.* is a moiety of 50*l.* now in the hands of my trusty friend, Mr. *Fremoult*, of *Canterbury*; the other moiety

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whereof being the property of my late sister, and was by her given to my said nephew, *John Ravell* the elder.

“ Item, I give and bequeath to my faithful and much-esteemed friend, *Sarah Russell*, widow, (now residing with me in my dwelling-house, in the parish of *Postling*), all that my messuage or tenement wherein I now live and dwell, together with the stable, out-houses, garden, backside, and appurtenances thereunto belonging; as also the right of commonage for, and cow lees on *Postling Lees*.

“ Item, I do also give and bequeath to the said *Sarah Russell*, widow, one like messuage or tenement, with the garden, backside, and appurtenances thereunto belonging, now in the occupation of the widow *Graves* and the widow *Turrall*; which said premises are all situated, lying, and being in the parish of *Postling*, in the county of *Kent*.

“ I do also give and bequeath to the aforesaid *Sarah Russell*, widow, her executors and administrators, all the rest, residue, and remainder of my estate and my estates whatsoever and wheresoever, (that is to say) my ready money and wearing apparel, and all the interest-money that shall be due to me at the time of my decease; as also my household goods, fixtures, and furniture, and the remainder of my goods and chattels of what nature and kind soever; she, from the produce thereof, first paying and discharging all my just debts, funeral expenses, and the expense and charge of proving this my will in Court. I do also hereby appoint the said *Sarah Russell*, widow, trustee to *John Ravell*, junr., that is, I order that she shall hold the house and premises I have before left to *John Ravell*, junr., and receive the rents till he is eighteen years of age, for her own use, without being accountable to any one for so doing. I do hereby give *Sarah Russell* the rent of *John Chaplin's* house and premises for her own use till the said *John Ravell*, junr., is eighteen years old; and, if he dies before that time, then all that I have

left him shall descend and go to *Sarah Russell*, widow; and I do hereby appoint and nominate her the said *Sarah Russell*, widow, to be sole executrix of this my last will and testament, and do revoke all former ones before made, solemnly declaring this, and this only, to be my last will and testament. In witness whereof I have hereunto set my hand and seal, this 6th day of *June*, in the year of our Lord 1780.

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“ *Margaret Ravell.* ”

The testatrix died in the same year, seised of the several premises mentioned in the will.

Mrs. *Sarah Russell*, the devisee, soon afterwards entered into possession of the two messuages so devised to her, and lived in one of them and let the other. She continued in such possession and in receipt of the rent of the other messuage until her death, which happened in the year 1822. She left two sons, *Thomas* and *William Russell*, co-heirs in gavelkind, and they entered and took possession of the messuages and received the rents thereof. *William Russell* died in 1823, leaving two sons and co-heirs-at-law, who, after their father's death, *viz.* on the 2nd *July*, 1824, executed a conveyance, whereby they assumed to convey a moiety of the said messuages to *Thomas Russell*, who, on the 5th of the same month, mortgaged the said messuages to the lessor of the plaintiff for securing a sum of 97*l.* *Thomas Russell* continued to receive the rents of the messuages from the death of his mother until the defendant, *John Ravell*, claiming title to the same as heir-at-law to the testatrix *Margaret Ravell*, in the year 1829, took adverse possession.

The question for the opinion of the Court was, what estate the said *Sarah Russell* took under the will of the testatrix; and the verdict was to stand if she took an estate in fee; otherwise it was to be set aside, and a nonsuit entered.

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*Comyn*, for the lessor of the plaintiff.—*Sarah Russell* took an estate in fee in the two messuages devised to her. The general rule of construction is, to give effect to the intention of the testator, if such intention can be ascertained. *Doe d. Spearing v. Buckner* (a). In *Wilce v. Wilce* (b), the introduction of the will was similar to the present, and the Chief Justice said the only question was, whether, on the face of the will, there was a sufficient indication of an intention on the part of the testator to pass real property by the residuary clause of the will, because the intention of the testator, as had been well said, was the polar star in the construction of a will. The words there were “as touching such worldly property wherewith it hath pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner,” than which, the Chief Justice said, nothing could be more comprehensive:—“No one could doubt that the testator meditated disposing of all he had in the world. The question is, whether, looking at the body of the will, we can see that he has carried that intention into effect.” From the preamble here, it is manifest that the testatrix meant to dispose of all her property. She distinguishes betwixt real and personal estate, and, by confining the residuary clause to personal property merely, clearly indicates that she understood she had previously made an absolute disposition of her realty. The devise over to *Sarah*, in the event of *John’s* death before eighteen, also shews an intention to give more than a life estate, and would pass an estate in fee. *Purefoy v. Rogers* (c).

*Platt, contra*, was stopped by—

LORD LYNDHURST, C. B.—The presumption in favor of passing the fee does not arise, nor does the case cited in

(a) 6 T. R. 610.

C. 7 Bing. 667.

(b) 5 Moore & Payne, 682; S.

(c) 2 Wms. Saund. 388, n.

support of that presumption apply, as the devise over was not to the heir-at-law. The words "all I have left him shall descend and go to *Sarah Russell*," would not carry an estate in fee to her if a life estate only were given to *John Ravell*. Many cases shew that the introductory words will not override the special words of disposition: though they may assist the Court in the construction, and though the introduction may be clear, as in the case of *Wilce v. Wilce*, the Court cannot act upon them alone, unless there be subsequent words to carry into effect the intention there expressed. The residuary clause in this will does not convey real estate, it is qualified and contains an enumeration applicable to personalty only.

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BAYLEY, B.—Many cases shew that the words in the preamble cannot make a larger estate than is given in the body of the will. The common rule is, that, to pass an estate in fee, there must be words of limitation, words expressly shewing the quantity of the estate, or words making a charge on the devisee of the land. The residuary clause in *Wilce v. Wilce* contained the words "every thing else I die possessed of," which would have been sufficient to pass real estates, without more, but no such language occurs in this will, the language of which at best is but problematical.

Judgment for the defendant.

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1832.

BENNETT v. POTTER.

Judgment for  
want of a plea  
may be signed  
on a holiday.

**T**HE time for pleading in this case expired on a holiday, at six o'clock in the evening of which day the plaintiff opened the office and signed judgment for want of a plea. At eight o'clock the plea was delivered.

*John Jervis* applied to set aside the judgment for irregularity, contending that the plaintiff had no right to open the office for the purpose of signing judgment, but *per*—

LORD LYNTHURST.—The office may be opened at any time; it is closed on a holiday for the benefit of the officers, and they may attend if they think fit so to do.

Rule refused.

NICKLING v. DICKENS.

A declaration in the *Exchequer* (before the uniformity of process act) omitting to conclude *quo minus sufficiens*, &c. is bad on special demurrer.

**D**EBT by the plaintiff, *debitor regis*. The declaration did not conclude *quo minus sufficiens* &c; upon which ground the defendant demurred specially.

*Humphrey*, for the demurrer.—The allegation that the plaintiff is a debtor to the king, is not sufficient to give this Court jurisdiction, unless it also appear that the crown debt is in danger; for, the *Exchequer* has only a jurisdiction in pleas for the more speedy satisfaction of the king's debt or duty (*a*), and for the profit of the king (*b*). The practice has always been to conclude with this averment, and the rule of *T. T. 1 Will. 4*, prescribing a form, is mere—

(*a*) 2 Inst. 551.

(*b*) 4 Inst. c. 11, p. 112.

ly given as an instance, and does not dispense with that which is necessary to give the Court jurisdiction (a).

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*Mansell, contrd.*, contended that the rule *T. T. 1 Will. 4*, founded upon the statute 1 *Will. 4*, c. 70, s. 11, altered the old form, and insisted, that, at all events, the allegation that the plaintiff was a debtor was sufficient to give the Court jurisdiction within the statute of *Rutland*, 10 *Edw. 1*, s. 11. He also cited 36 *Edw. 3*, c. 15, by which it is declared, that, by the antient terms and forms of the declaration, no man shall be prejudiced so that the matter of the action be fully shewed in the declaration, and referred to 37 *Edw. 3*, c. 18, and 42 *Edw. 3*, c. 3. He likewise mentioned 2 *Burton*, 96, and *Hardres*, 71, where, as he said, the statement in the commencement of the declaration, "that the plaintiff was a debtor," was not inserted.

LORD LYNTHURST, C. B.—I am of opinion that this declaration is not sufficient, and that the demurrer must be allowed. From the earliest period when this Court exercised jurisdiction with respect to private individuals, in the writ itself and in the declaration this allegation has been contained. The practice has been uniform and invariable, and no case of the omission of the *quo minus* clause has been clearly shewn, and the practice is evidence of the law; I consider it, therefore, material to adhere to the form.

(a) The original plea jurisdiction of the *Exchequer* was twofold; where the plaintiff was a debtor and could not pay the crown debt without the assistance of the Court, and where either the plaintiff or defendant was a minister or accountant of the crown accounting in Court, in which case, lest the business of the crown should be interfered with, the parties were privileged to sue and be

sued in the *Exchequer*. This latter ground was not adverted to in the argument, and would, it is submitted, have been sufficient to have sustained this declaration upon the demurrer as framed, because the declaration by bill stated the defendant to be present in Court, and every intendment should be made in favour of the jurisdiction.

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BAYLEY, B.—I regret that we have been forced to pronounce a judicial decision upon this question; but I have no hesitation in saying that my opinion concurs with that of my Lord Chief Baron. By *Magna Charta*, it was provided that the King's Court should be held in one certain place. This confirmed the jurisdiction in personal actions by the Court of *Common Pleas*. It was very soon discovered by the other Courts that the provisions of *Magna Charta*, might be clearer; and the Court of *King's Bench* obtained jurisdiction in personal actions by the introduction of the fiction that the party sued was in the custody of the marshal. The Court of *Exchequer* also acquired jurisdiction by the allegation that the plaintiff was a debtor to the king. Not, however, a debtor generally; but a debtor in such a way as that, by the non-payment of the debt due to him from the defendant, the crown sustained an injury "by means whereof he was the less able to pay" to the king the crown debt. The statute of *Rutland*, has been referred to, in which it is provided, that no plea shall be holden or pleaded in the *Exchequer* aforesaid, unless it do specially concern us and our ministers aforesaid. Now, I presume that the *quo minus* clause may bring the case within this statute, as, where the debtor is less able to pay the king, it is a matter that does "concern us." From the time of that statute down to the present, I believe, without a single exception (I say so because no exceptions have been shewn, or any instance cited to the contrary) the declaration in the *Exchequer* has contained the double allegation that the plaintiff is a debtor, and that he is the less able to pay the crown, or in other words, that the crown debt is in danger. Being able then to see some foundation for this allegation on principle, and that it is necessary, to elude the express provision of the statute of *Rutland*, it follows that the plaintiff must comply with the form, or will expose himself to the risk of a special demurrer.

BOLLAND, B.—It appears to me that this form has been pursued from the earliest times, and has the concurrent authority of all the precedents. It must, in my opinion, be pursued.

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GURNEY, B., concurred.

Judgment for the defendant.

TRAVIS v. COLLINS.

**HATFIELD** entered into an agreement with *Collins*, by which the latter took a mill from *Hatfield*, and undertook to keep the same in tenantable repair. *Hatfield* sold the mill to the plaintiff, and the mill having been destroyed by fire, the plaintiff filed a bill in *Chancery* to compel the defendant to rebuild it; and, in the defendant's answer, the existence of the agreement was admitted, and a copy set out.

The plaintiff afterwards brought an action upon the agreement, and—

*Cowling* moved for a rule to shew cause why the defendant should not produce the agreement at the stamp office, to have it stamped, and why he should not produce it at the trial, and give the plaintiff a copy.

The former part only of the rule was granted, because it was observed by *Bayley*, B., that the plaintiff might give secondary evidence, if the original was not produced at the trial, and it might be unjust to allow the plaintiff to read the agreement, without also taking the explanation which might be given of it in the defendant's answer.

If two parts of an agreement be interchangeably executed between landlord and tenant, in an action upon the agreement by a purchaser of the premises, the Court will not compel the tenant to produce his part to be stamped, unless such purchaser has applied to the vendor, or used every endeavour, without success, to find him.

*Quære*, as to the power of the Court to restrain a party from taking an objection to evidence at *Nisi Prius*—e. g. the production of an unstamped agreement.

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1832.

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It was sworn in answer to this application, that the defendant's copy of the agreement had been destroyed after it was returned from *Chancery*; and cause was shewn by—

*Wightman*.—The defendant cannot produce what he has not. But, even if his copy was in existence, the vendor, *Hatfield*, under whom the plaintiff claims, was the proper person to have resorted to; for, he must have, or ought to have, a copy; and, until application has been made to him, no order can be granted against the defendant. Moreover, the plaintiff is no party to the agreement, and upon that ground the Court cannot interfere. In *Lawrence v. Hooker* (a), the Court refused to compel the production of an instrument for the purpose of having it stamped, at the instance of a plaintiff who was no party to it, because it would be dangerous to interfere with the rights and liabilities of third parties. The ground upon which the Courts have interfered, is, that the party who has the custody of the instrument held it as a trustee for the applicant. *Street v. Brown* (b). But, where the applicant is no party to the instrument, or the information can be obtained from another source, *Brown v. Rose* (c), the Court will make no order.

*Cowling, contra*, prayed a reference to the Master, to ascertain when the defendant's copy of the agreement had been destroyed, and, if found to have been destroyed designedly, for a rule to shew cause why secondary evidence of it should not be given without a notice to produce the original; and he cited as a precedent for the application, *Bousfield v. Godfrey* (d).

LORD LYNTHURST, C. B.—In the case cited, there was

(a) 2 M. & P. 9; S. C. 5 Bing. 6.

(b) 6 Taunt. 302.

(c) 6 Taunt. 283.

(d) 2 M. & P. 771; S. C. 5 Bing.

418.

a copy of the agreement in the defendant's custody; in this there is not. If we were to make such an order, the defendant might, nevertheless, tender a bill of exceptions for the reception of improper evidence.

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Rule discharged.

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ON a subsequent day, *Cowling* again moved for leave to stamp a copy of the agreement, and for a rule to shew cause why the defendant should not be precluded from producing the original at the trial, or from objecting to the want of any stamp thereon; or why an attachment should not issue against the defendant for destroying the agreement, if it should appear to have been destroyed after the rule to produce it was obtained. Several applications had been made to *Bolland*, B., at Chambers; the first was made on the 26th *January*, which was discharged. It was again renewed on the 18th *February*: and, after several attendances, an order was made for the production; which, on the 24th *February*, was recalled. He cited *Bousfield v. Godfrey*, and relied upon *Alver v. George* (a) as supporting the equitable jurisdiction of the Court to interfere and prevent the defendant from producing the original agreement, or objecting to the production of a copy because the original was not stamped; and, in answer to the observation that the defendant might tender a bill of exceptions, he mentioned *Gulley v. Bishop of Exeter* (b), to shew that a Court of error would not inquire into the propriety of an order made by the Court. [*Bayley*, B.—The Court cannot do more than grant a rule to shew cause why the copy should not be stamped, in order that it may be used at the trial, if available. It is doubtful whether we can restrain the defendant from objecting that the ori-

(a) 1 Camp. 392.

(b) 10 B. & C. 584.

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ginal was not stamped; for, the effect of such an order would be, to alter the rule of evidence, and I do not see how a Judge at the trial, could, under the circumstances, refuse to seal a bill of exceptions.]

The rule was accordingly drawn up to stamp the copy, and for the attachment; and, in answer, the defendant shewed that his copy of the agreement had been destroyed before the making and recalling of the order of the 24th *February*, and that two originals of the agreement had been executed, one of which the defendant believed to be in the custody and under the control of *Hatfield*, the vendor.

*Wightman* shewed cause, and contended that there was no necessity to call upon the defendant to produce the agreement, and that the plaintiff stood in the situation of *Hatfield*, who could not have compelled the defendant to produce his part of the agreement; and, further, that the plaintiff ought not be allowed to stamp a copy of the agreement and produce it in evidence, as there was one part of it in *Hatfield's* hands.

*Cowling*, in support of the rule, insisted that the rule was in advancement of justice, as *Hatfield* could not be found by the plaintiff, and might be called by the defendant to shew that he had an original, which, if not stamped, would render the copy inadmissible in evidence.

BAYLEY, B.—The facts are now more fully before the Court than upon the former discussion. There were originally two parts of the agreement, one of which is sworn to be in the possession of *Hatfield*, through whom the plaintiff claims, and from whom he purchased. That part should properly be in the possession of the plaintiff. If only one part of this agreement had originally existed, the Court would have ordered the party in whose possession it was to attend at the stamp office for the purpose of having it stamped; and, had it been found, that, for the

purpose of evading the order of the Court, the instrument had been destroyed, the Court might, under such circumstances, have ordered a copy to be stamped; but, whether such order would have made the stamped copy admissible in evidence, would have been a matter of very great doubt. The rule that a party who has an instrument in his possession shall be compelled to produce it for the purpose of stamping it, does not apply if it appears that, at the time when the agreement was made, there were two parts interchangeably executed. Here it is sworn that the defendant believes that one part is in the possession of *Hatfield*, and therefore this case is not within the ordinary rule. The plain ground upon which the Court are bound to discharge this rule, is, that, as there were two parts of the agreement, there was no foundation for applying to this Court to order the defendant to produce his part to be stamped, as the Court could not have made the order without being satisfied that every attempt had been made to obtain that copy which was originally in *Hatfield's* possession. However, as the existence of the two parts is now mentioned for the first time, the rule should be discharged without costs.

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VAUGHAN, B.—It is only where there is but one part of the agreement that the Courts are in the habit of interfering. There was only one part in *Bousfield v. Godfrey*, and that had been surreptitiously obtained by the defendant.

BOLLAND, B.—In the discussions before me it was never intimated that there were two parts of the agreement, and therefore I think that the rule should be discharged without costs.

Rule discharged, without costs.

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ANDERSON v. BELL.

If *A.* grant an annuity, and *B.* indemnify him by bond, *A.* may arrest *B.* for the amount of the arrears which *A.* may have been compelled to pay.

**T**HE plaintiff granted an annuity upon being indemnified by the defendant by bond, and having been compelled to pay up the arrears in order to prevent a distress, arrested the defendant for the amount; upon which—

*Biggs Andrews* moved to discharge the defendant out of custody upon filing common bail, contending that the sum sought to be recovered was unliquidated damages.

*Lewin*, Sir *Gregory*, who shewed cause in the first instance, referred to *Tidd*, 173, who says, that, where a bond is conditioned to save harmless, the defendant should be arrested only for the damages really sustained; and contended that the arrest was for a sum certain, for, *id certum est quod certum reddi potest*.

**LORD LYNTHURST, C. B.**—The plaintiff has made a money payment, against which the defendant undertook to indemnify him, therefore the action is against him for not paying that sum certain, from the payment of which there was the undertaking to indemnify. That is enough to justify the arrest.

Rule discharged.

*Exch. of Pleas,*  
1832.

## CLAPWORTHY v. COLLIER.

**T**HE plaintiff applied to be discharged under the Insolvent Debtors' Act, and was remanded for three years. During his confinement, his wife was supplied with money by her friends, with which she purchased a quantity of oranges. These oranges were seized by the defendant, and delivered to the plaintiff's assignees; and the plaintiff having brought an action of trover—

An insolvent brought an action to recover property acquired by him after his assignment; no order had been made to the Insolvent Court to enable the assignees to issue execution against the property, and the Court refused to require security for costs.

*Roscoe* applied for security of costs.

*Wightman* shewed cause.—Property acquired by an insolvent after the assignment by him, does not vest absolutely in the assignees under the Insolvent Act, 7 Geo. 4, c. 57, but they can only get such property upon application to the Insolvent Debtors' Court, by taking out execution upon the judgment which has been entered up in the names of the assignees. Mere insolvency and poverty are not alone sufficient grounds for this application. In *Heaford v. Knight* (a), the debt was due and the action was commenced before the plaintiff's discharge, and the debt was inserted in his schedule: so that the action was proceeded with for the benefit of the creditors.

*Roscoe, contra*, relied upon *Heaford v. Knight*.

**BAYLEY, B.**—This is not a case in which we should require the plaintiff to give security for costs. The action is brought by the insolvent, on the ground, that, subsequently to the assignment, he acquired property by the intervention of his friends. The property so acquired would not pass

(a) 2 Barn. & Cress. 579; S. C. 4 D. & R. 81.

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1832.

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to the assignees without an order from the Court to that effect, and, no order having been made, we might deprive the plaintiff of the power of enforcing his just demands, and of obtaining redress for a substantial injury, were we to require him to give security for costs as the condition of his further proceedings. In a case where an uncertificated bankrupt brought an action to try the validity of the commission, the Court refused to grant an application for security for costs, giving as a reason that the bankrupt ought not to be precluded from trying the question, and they would not deprive him of the power of so doing (a). The cases are analogous. If the Court had made an order to pass this property to the assignees, we might have required security for costs, but, no order having been made, we cannot do so.

Rule discharged.

(a) See *Cohen v. Bell, T. T., King's Bench*, 44 Geo. 3, Tidd. 468.

SHEPHARD, Assignee &c., v. SHUM.

Process must be indorsed with the name of the attorney immediately employed, pursuant to stat. 2 Geo. 2, c. 23, s. 22: the name of the agent is not sufficient.

THIS action was commenced by serviceable *quo minus*, on which the name of the attorney actually employed, who was not an attorney of this Court, was not indorsed, but the names of the agents only. On this ground, Sir *W. Owen* obtained a rule to shew cause why the proceedings should not be set aside for irregularity, with costs.

*Espinasse*, who shewed cause, submitted that the attorney actually employed could not issue the process, not being an attorney of this Court, and that in fact the agents were the attornies issuing the process, so that the statute

2 Geo. 2, c. 23, s. 22, and the rule *M. T. 1 Will. 4*, were in effect complied with.

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1832.

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v.  
SHUM.

Sir *W. Owen, contra*, referred to the statute 2 Geo. 2, c. 23, s. 22, which requires the indorsement of the name of the attorney immediately employed, and of the agent who sues out the writ, and referred to *Yates v. Frechilton* (a), to shew that the object of the rule, *viz.* the opportunity of settling the action, would be defeated by the indorsement of the agent's name only, as a payment to the agent would not be sufficient. *Miller v. Bowden* (b) was also mentioned.

PER CURIAM.—The process might and ought to have been indorsed with the name of the attorney immediately retained, and also with that of the attorney in whose name he practised. The object of the rule is to give the defendant an opportunity of settling the action without incurring expense; and, if the name of the agent only is stated, who probably lives at a distance, the defendant has not that opportunity. The statute is not complied with—the name of the person immediately retained is not indorsed.

Rule absolute.

(a) Doug. 623.

(b) 1 Crompt. & Jerv. 563.

*Exch. of Pleas,*  
1832.

INNIS *v.* SMITH.

A notice of bail did not state the numbers of the houses where the bail resided, upon which ground, the bail having been found and being sufficient, the plaintiff had the costs of his appearance to oppose.

**THE** notice of bail did not state the numbers of the houses where the bail resided, upon which ground *Addison*, who had an affidavit that the houses of the bail were numbered, objected to the notice. He admitted that he had found the bail.

**BAYLEY, B.**—If the plaintiff wishes for time for inquiry, he shall have it; but, if he is satisfied of the sufficiency of the bail, then, upon condition that the bail now justify, the plaintiff shall have the costs of his appearance here.

The latter proposition was adopted, and the—

Bail justified.

FRENCH *v.* BURTON.

A term's notice is not necessary before motion for costs of the day.

**RICHARDS** in this term had obtained a rule for costs of the day for not proceeding to trial, pursuant to notice. The notice of trial was for *Trinity* Term, 1831, since which time no step had been taken in the cause.

*White* objected that the plaintiff was entitled to a term's notice, but—

**THE COURT** said, that a term's notice was only necessary where the object was to speed the cause, and the rule was made—

Absolute.

*Exch. of Pleas,*  
1832.

## GROSJEAN v. MANNING.

**THIS** cause stood for trial on *Monday* the 30th *April*. On *Saturday* the 28th, at 8 in the evening, the plaintiff gave notice of continuance to the next sittings, which were on the 7th May. The defendant did not appear on that day, and a verdict passed for the plaintiff, which *Carrington* moved to set aside, because, as he contended, the notice was not served two clear days before the sittings when the cause was to have been tried; and a rule having been granted—

Notice of continuance of notice of trial served on *Saturday*, the cause standing for *Monday*, is not sufficient. The intervening *Sunday* is not reckoned.

*Busby*, who shewed cause, contended that the notice was sufficient; and he mentioned the case of bail being sued on their recognizance, where *Sunday* is reckoned; and a notice of countermand; and observed that the object of the rule was fully answered, as the defendant had ample time to apprise his witnesses that they would not be wanted on the day first appointed; although, if that were the only objection, it would resolve itself into a mere question of the costs of the day.

PER CURIAM.—The object of the rule was, that the party should have two clear business days after the notice. *Sunday* is no day for business. The defendant in fact had only 13 hours' notice, and had no time to send his witnesses back before *Monday*.

Rule absolute.

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 NEWTON v. MAXWELL.

**SCI. FA.** against bail. One of the bail resided in *Middlesex*, and the other in *Surrey*. The former was summon-

The Court will not give leave to sign judgment on a *scire facias* against

bail, on a summons of one in *Middlesex*, unless the other, resident out of *Middlesex*, is warned of the proceeding.

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1832.

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v.

MAXWELL.

ed, the latter had no notice of the proceeding. Eight days after the return of one *sci. fa.* pursuant to rule *H. T. 2 W. 4*—

*Kelly* moved for leave to sign judgment for want of an appearance, but—

BAYLEY, B., said that the object of the rule was to prevent the plaintiff from proceeding behind the back of the bail, and without giving them notice of the steps which were taken. The bail out of *Middlesex* could not be summoned, but he must have notice before the Court could allow the judgment to be signed; and so—

Nothing was taken.

#### WILKINSON v. MALIN and Others.

A trust to apply certain funds "towards the repairs of the church of *W.*

**TRESPASS.**—*First* count, on statute 8 *Hen. 6*, c. 9, for a forcible entry into a dwelling-house and premises at *W.*,

the payment of the 15ths, and relief of the poor of *W.*, buying of armour and setting forth soldiers, and repairing *Sawbridge*-bridge, within the parish of *W.*," is of a public nature; and, therefore, an act done by a majority of the trustees assembled for that purpose, is valid.

Building a school-house, and educating poor children, is within the meaning of a trust for the "relief of the poor."

The appointment of a schoolmaster, elected by a majority of the trustees at a meeting assembled for the purpose of the election, need not be in writing, nor can he be dismissed, except by a majority of the trustees at a similar meeting.

An allegation, that certain persons were seised in fee of the premises, and used the same as a school-house, and also as and for the residence of the schoolmaster of the said school-house, is not inconsistent with evidence of a trust deed, limiting the nature of the appointment, and regulating the manner of dismissal; and possession of the premises is incident to the appointment of schoolmaster, whilst that employment continues.

To a plea of *liberum tenementum* in certain persons, the plaintiff replied, soil and freehold in the same persons as trustees of a charitable fund, and in no other right whatsoever; and that the premises had been used by those persons, and their predecessors, as such trustees, for a school-house, and for the residence of the schoolmaster; and that the plaintiff was duly appointed schoolmaster of the said school-house, by the then trustees of the said charitable fund, not naming nor stating a seisin in fee in the trustees who had appointed, nor any power by which the appointment was made, nor the trusts of the charitable fund, nor the deed by which they were created:—*Held*, good on motion to arrest the judgment.

Where the words of a second deed are sufficient to pass the whole of the property conveyed by a former deed, and the intention to do so is clear, a mistake in describing the occupation will not vitiate.

Evidence of an appointment as schoolmaster at a salary of 20*l.* a year to himself for teaching boys, and 20*l.* a year to his wife for teaching girls, satisfies an allegation of an appointment at a salary of 40*l.*

of which the plaintiff, a school-master, was seised in his demesne as of fee, and expelling him therefrom, alleging special damage—*second* count, for breaking, &c. a certain other dwelling-house of the plaintiff, with an *asportavit* and special damage—*third* count, for an expulsion—*fourth*, for forcibly turning the plaintiff and his family out of possession—*fifth*, *de bonis asportatis*—*sixth* and *seventh*, for assaults.

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1832.

WILKINSON  
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Pleas—*First*, not guilty. *Secondly*, to the second count, that the dwelling-house and premises in the second count, were and are the freehold of *J. Malin*, and *M. Jephcott*, and of *C. Cowley*, *Thomas Cock*, *W. Ellard*, *W. Dester*, *T. Hesom*, *T. Hancock*, *W. Crupper*, and *John Cock*, wherefore, *J. M.*, *M. J.*, *T. H.*, *T. H.*, and *T. C.*, in their own right entered, and the said other defendants, as their servants, and by their command, &c. entered &c. There were seven other similar pleas to the second count, stating the freehold to be in different individuals to the above ten.

Replications—similiter to general issue. To the second plea, that said dwelling-house and premises, &c. were the dwelling-house and premises, close, soil, and freehold of the said *J. Malin*, *M. Jephcott*, *C. Cowley*, *T. Cock*, *W. Ellard*, *W. Dester*, *T. Hesom*, *T. Hancock*, *W. Crupper*, and *John Cock*, as trustees of a certain charitable fund theretofore granted for (amongst other things) the relief of the poor of *W.* aforesaid, and in no other right or capacity whatsoever, the said dwelling-house, &c. were used by the said *M. Jephcott*, *J. Malin*, *C. Cowley*, *T. Cock*, *W. Ellard*, *W. Dester*, *T. Hesom*, *T. Hancock*, *W. Crupper*, and *John Cock*, as such trustees as aforesaid, and by their predecessors, trustees for the said charitable fund, for a school-house for the education and instruction of divers poor children of and belonging to *W.* as aforesaid; and also as and for the residence of the schoolmaster of said school-house; that, long before the said several times when &c., to wit, on 1st *January*, 1819,

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the plaintiff was duly appointed schoolmaster of said school-house by the then trustees of the said charitable fund, (the said dwelling-house, &c. being then and there the dwelling-house, &c. and freehold of the said last-mentioned trustees), upon the terms and stipulations (among other things) in substance following, that is to say, that the trustees for the time being of said charitable fund, should pay the plaintiff the wages or salary of 40*l.* annually, so long as he should continue such schoolmaster of said school-house as aforesaid; and that he, the said plaintiff, should have the peaceable and quiet possession of the said dwelling-house, &c. as and for his residence as such schoolmaster as aforesaid; that he accepted the said office upon the terms aforesaid, and entered into and had peaceable possession of the said dwelling-house and premises as such schoolmaster, and continued in such office, and was so possessed of the said dwelling-house, &c. from thence until said defendants broke and entered, &c. There were similar replications to each of the above pleas.

The seventh and eighth replications were demurred to generally, and, on argument in a previous term, were held bad, the title pleaded not being founded on a seisin in fee, and not stating the names of the trustees, the charitable fund, or the nature of it; but the Court gave leave to amend on the payment of costs.

The plaintiff thereupon filed a new replication to the seventh and eighth pleas respectively—That, long before the said several times when &c., in the said count in said declaration mentioned, and long before the said *W. Dester, T. Hesom, T. Hancock, W. Crupper, and J. Cock*, or any or either of them, had anything in said dwelling-house, with the appurtenances therein also mentioned, to wit, on the 1st January, 1819, the said *M. Jephcott, T. Malin, C. Cowley, T. Cock, T. Ellard*, now deceased, *W. Ellard*, and one *Henry Mills*, now deceased, were seised in their demesne as of fee (amongst other things) of and in said dwelling-

house and premises, with the appurtenances, to wit, at *W.*, &c., and then and there used the same as a school-house, for the education and instruction of divers poor children of *W.* aforesaid, and also as and for the residence of the schoolmaster of the said school-house; and, being so seised of the said dwelling-house and premises, with the appurtenances, and so using the same as aforesaid, the said *M. Jephcott, J. Malin, C. Cowley, T. Cock, W. Ellard, H. Mills, and T. Ellard* afterwards, and long before the said *W. Dester, T. Hesom, T. Hancock, W. Crupper, and J. Cock*, or any or either of them, had anything in said premises, to wit, on &c., at &c., duly appointed the said plaintiff to the employment of schoolmaster of the said school-house, upon certain terms and stipulations, to wit, the terms and stipulations (amongst other things) in substance following; that is to say, that there should be paid to the said plaintiff certain wages or salary, to wit, the wages or salary of 40*l.* annually, so long as he should continue such schoolmaster of the said school-house as aforesaid; and that the said plaintiff should be suffered and permitted to have the peaceable and quiet possession, use, occupation, and enjoyment of the said dwelling-house and premises, with the appurtenances, as and for his residence as such schoolmaster as aforesaid, until his dismissal from the said employment by a majority of the persons who, for the time being, should be seised of the said premises. And the plaintiff averred that he then and there accepted the said employment upon the terms and stipulations aforesaid, and then and there entered into and had the peaceable and quiet possession, use, occupation and enjoyment of the dwelling-house and premises, with the appurtenances, as such schoolmaster as aforesaid, and remained and continued in such employment, and so possessed of the said dwelling-house and premises, upon the terms and stipulations aforesaid, from thence continually, until the said de-

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fendants afterwards, and whilst said plaintiff was schoolmaster as aforesaid, upon the terms and stipulations aforesaid, to wit, at said several times when &c., of their own wrong, broke and entered into the said dwelling-house and premises, with the appurtenances, and committed the several trespasses, &c.

*Rejoinders*—To the replication to the second plea, that the said dwelling-house, &c. in the said second count of the said declaration mentioned, were not the freehold of the said *M. J.*, &c. as trustees of a certain charitable fund, theretofore granted for (amongst other things) the relief of the poor of *W.* aforesaid, and in no other right or capacity whatsoever.—To the replication to the third plea, that the said dwelling-house, &c. were not used by the said *J. Malin*, &c. as such trustees as aforesaid, and by their predecessors, trustees of the said charitable fund, as and for a school-house for the education and instruction of divers poor children, of and belonging to *W.* aforesaid, and also as and for the residence of the schoolmaster of said school-house.—To the replication to the fourth plea, that the said plaintiff was not duly appointed schoolmaster upon the terms and stipulations in the said replication mentioned.—To the replication to the fifth plea, that the said plaintiff was not duly appointed schoolmaster of the said school-house by the then trustees of said charitable fund, upon the terms and stipulations (amongst other things) that the trustees should pay the plaintiff certain wages or salary of 40*l.* annually, so long as he should continue such schoolmaster; and that the said plaintiff should have the peaceable occupation of the said dwelling-house and premises as and for his residence as such schoolmaster as aforesaid.—To the replication to the sixth plea, that the plaintiff did not remain and continue in such office, and so possessed of said dwelling-house and premises, &c. in manner and form as the said plaintiff had in his said replication to said sixth plea alleged.—To the replication to the seventh plea, the said defendants, *T.*

*Hesom, T. Hancock, W. Quinney, W. Allibone, T. Hudson, and A. Musson*, protesting that the said *M. Jephcott, J. Malin, C. Crowley, J. Cock, W. Ellard, H. Mills, and T. Ellard*, did not, before the said several times when &c., and before the said *W. Dester, T. Hesom, T. Hancock, W. Crupper, and J. Cock*, or any or either of them, had any thing in the said premises, duly appoint the said plaintiff to the employment of schoolmaster of the said school-house, upon the terms and stipulations (amongst other things), in substance, that there should be paid to the said plaintiff certain wages or salary of 40*l.* annually, so long as he should continue such schoolmaster of the said school-house as aforesaid; and that he, the said plaintiff, should be suffered and permitted to have the peaceable and quiet possession, use, occupation, and enjoyment of said dwelling-house and premises, with the appurtenances, as and for his residence as such schoolmaster as aforesaid, until his dismissal from the said employment by a majority of the persons who for the time being should be seised of and in the said premises—for rejoinder, nevertheless, to said replication in this behalf, the said *T. Hesom, T. Hancock, W. Quinney, W. Allibone, T. Hudson, and A. Musson*, say, that all the said supposed interest and right of possession of the said plaintiff, of and in or to the said dwelling-house or premises in which &c. long before either of the said times when &c. in the second count mentioned, had been lawfully put an end to and determined, to wit, &c., yet the said plaintiff, although afterwards, to wit, at &c., in said second count mentioned, to wit, on the 21st of *February*, in the year 1831 aforesaid, to wit, at &c., duly requested by said defendants, the said *T. Hesom, and T. Hancock*, refused to deliver up possession of the said dwelling-house and premises, wherefore *T. Hesom and T. Hancock*, in their own right, and *W., &c.* as the servants of the said *T. H. and T. H.*, committed the said several supposed trespasses in the seventh plea mentioned, &c.—To the replication to

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the eighth plea, that the said *M. Jephcott, J. Malin, C. Cowley, T. Cock, W. Ellard, H. Mills, and T. Ellard*, did not before the said several times when &c., and before the said *W. Dester, T. Hesom, T. Hancock, W. Crupper, and J. Cock*, had any thing in said premises, duly appoint the said plaintiff to the appointment of schoolmaster of the said school-house as aforesaid, and that he the said plaintiff should be suffered and permitted to have the peaceable and quiet possession, use, occupation, and enjoyment of the said dwelling-house and premises, with the appurtenances, as and for his residence as such schoolmaster as aforesaid, until his dismissal from the said employment by a majority of the persons who, for the time being, should be seised of and in the said premises.—To the replication to the ninth plea, that the said plaintiff, on the 25th *December*, 1830, was lawfully dismissed from his said office as schoolmaster.—To the replication to the last plea, that, on the said 25th of *December*, 1830, all the estate and interest of him, the said plaintiff, of and in the said supposed office of schoolmaster in the said replication to the said last plea mentioned, and of and in the said dwelling-house and premises in the said second count mentioned, had been lawfully ended and determined.

On all these allegations, issues were joined in surrejoinders and rebutters.

The cause was twice tried, and at the second trial, before *Bayley, B.*, at the Spring Assizes for *Warwickshire*, in 1832, the following facts appeared in evidence.

By deed, dated 12 *Hen. 6*, *J. Hayward* and *M.* his wife granted and conveyed divers messuages, lands, tenements, and hereditaments situate in *Willoughby*, and other places in the county of *Warwick*, to certain trustees therein named, and their heirs, upon trust to apply the yearly issues and profits thereof from time to time towards the repairs of the church of *W.* aforesaid, the payment of the 15ths, and relief of the poor in *W.*, buying of armour and

setting forth soldiers, mending of causeways and highways in *W.* and repairing of *Sawbridge-bridge* in the parish of *W.* aforesaid.

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By order of certain commissioners of charitable uses, confirmed by the Court of *Chancery*, 10th *July*, 7 *Jac.* 1, it was ordered that certain fraudulent leases of the said trust premises should cease, and that the then surviving feoffees of the same should convey to ten trustees, therein named, and their heirs, upon trust that the issues and profits should from time to time be employed to the aforesaid charitable uses, and that, in what manner the same should be employed by the said trustees, should be contained in the deed of conveyance; and that, when all the said feoffees but five should die, the then five surviving feoffees should make like conveyance, upon the like trusts, to the use of themselves and five other persons, inhabitants of *W.* aforesaid, of the best and most sufficient persons, and their heirs.

By lease and release, of 22nd and 23rd of *May*, 1807, the trust premises in *Willoughby*, described as being now or late in the tenure or occupation of *John Cowley* and *William Cowley*, were conveyed by the then surviving trustees to ten new trustees. Long before 1816, a school had been established for the education of the poor of *Willoughby*, the expenses of which had been paid out of the above trust funds. The income of the charity having for many years averaged 400*l. per annum*, the trustees in that year, in exercise of the discretion given them by the said trust deeds, of applying the said funds generally towards the relief of the poor of *W.*, applied part of such funds in the erection of a school-house, and other requisite buildings for the purpose of such school, on the lands in *W.* described in the deed of 1807.

On the 26th *December*, 1816, the trustees for the time being appointed a schoolmaster and mistress at a salary of 40*l. per annum*.

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In *September*, 1818, all the trustees then remaining, being seven in number—*viz. J. Malin, T. Ellard, W. Ellard M. Jephcott, C. Cowley, T. Cock*, and, *H. Mills*, assembled for electing a schoolmaster, and, after some intimation of dissent by two of them, the other five concurred in electing the plaintiff, but no form of voting took place. The plaintiff was then told, he must be a married man; that the salary was to be 20*l.* to the master, and 20*l.* to the mistress; that it was required that he should be competent to teach the boys, and she the girls. The plaintiff was afterwards duly licensed to perform the office of schoolmaster in the school, by the bishop of the diocese. In *January*, 1819, the plaintiff and his wife entered on their duties, and became occupiers of the school-house and premises.

By lease and release of the 26th and 27th of *November*, 1827, *M. Jephcott, J. Malin*, and *T. Cock, C. Cowley*, and *W. Ellard*, being the only surviving trustees, for the considerations therein mentioned; released and conveyed the messuage or tenement, land, &c., forming the trust premises in *W.*, describing them as formerly in the tenure or occupation of *John Cowley* and *William Cowley*, and now of *William Cowley*, together with all and singular houses, &c. to the said messuage, &c. and premises, and to any and every of them belonging, or in anywise appertaining, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof, unto and to the use of *W. Dester, T. Hesom, T. Hancock, J. Cock, W. Crupper*, and their heirs, on trust that they, the said *M. Jephcott, J. Malin, T. Cock, C. Cowley, W. Ellard, W. Dester, T. Hesom, T. Hancock, J. Cock*, and *W. Crupper*, and their heirs, should employ the yearly income, rents, issues, and profits, of all and singular the said hereditaments and premises, from time to time, towards such charitable uses, intents, and purposes, as in the said original deed of grant mentioned.

The plaintiff relied on this deed, and that of 1807. *Dester* always refused to act as a trustee, or to execute the deed of 1827; but also refused to suffer his name to be struck out of it.

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Disputes having arisen between some of the trustees and the plaintiff, on the 14th of *January*, 1830, two notices were served on the plaintiff, one signed by *J. Malin*, *M. Jephcott*, *T. Cock*, *T. Hesom*, and *T. Hancock*, purporting to be a discharge of the plaintiff from his office of schoolmaster, from the 25th of *December* then next, and requiring him to give up possession of the school-house and premises, from and after this day, or other end of the year of his tenancy, which should expire next after half a year from the delivery thereof. On the 25th *January*, 1831, another notice, signed by the same trustees, was served on the plaintiff, demanding peaceable possession of the school-house, garden, and premises, and giving him notice to quit. They afterwards turned him out of possession, by the trespasses complained of.

The jury found a verdict for the plaintiff, on the second and sixth counts, assessing the damages separately on each, and, in answer to a question from the Judge, found that the plaintiff's salary was 40*l.* a year.

*Goulburn*, Serjt., in *Easter* term, moved for a rule to shew cause why the verdict should not be set aside, and a verdict entered for the defendants; or why judgment on the second count should not be arrested. He contended, on the general issue, as applicable to the second count, that the defendants were entitled to a verdict, as they had a right to give evidence that the plaintiff's interest in the land and office was determined, and of their own title, so as to justify an entry—*Dodd v. Kyffin* (a), *Taunton v. Costar* (b), *Argent v. Durrant* (c), and *Turner v. Meymot* (d).

(a) 7 Term Rep. 354.

(c) 8 Term Rep. 403.

(b) *Ibid.* 432, 2.

(d) 7 B. Moore, 574; S. C. 1 Bing. 158.

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On the second issue—The plaintiff did not make out his title under the deeds of 1807 and 1827. The school-house did not pass under the conveyance of 1807; and the defendants' character of trustees was not established, as, although *Dester's* name was inserted in the deed of 1827, he refused to execute or to act under it.

On the third issue—The deed of 1827 did not pass the school-house, or any part of its site, as the premises were described as being in the occupation of *W. Cowley*, whereas the school-house was then in the occupation of the plaintiff. It is true, that the land on which the school-house was afterwards erected, was, in 1807, in the occupation of the *Cowleys*; but, as a part of the trust property, exclusive of the school-house, is sufficient to satisfy the description of the premises, and there is no ambiguity on the face of the deed, extrinsic evidence to shew that the description was used in a more extensive sense is inadmissible. *Doe d. Chichester v. Oxenden (a)*, and *Doe d. Browne v. Greening (b)*.

On the fourth issue—The plaintiff was not duly appointed schoolmaster. The situation is termed an *office* in the replication, and therefore a majority of the existing trustees had no power to appoint. *Withnall v. Gartham (c)* does not apply, as the validity of the appointment there depended upon the construction of a power conferred by an antient foundation deed. But, if a majority of the trustees had such power, the appointment without deed was bad, inasmuch as the office was incident to, or took effect out of an interest in land. *Saunders v. Owen (d)*.

On the fifth issue—The allegation that the plaintiff was appointed schoolmaster, at the salary of 40*l.* annually, was not established by the evidence that he was to receive 20*l.*

(a) 3 Taunt. 147.

(b) 3 Mau. & Selw. 171.

(c) 6 Term Rep. 388.

(d) 1 Salk. 467; S. C. 1 Lord Raym. 158; 1 Inst. 49. a.

for teaching the boys, and his wife 20*l.* for teaching the girls. This, therefore, was a variance. *Exch. of Pleas,*  
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On the issue, that the interest and right of possession of the plaintiff had been put an end to, and determined—The plaintiff, in his replication, claims the employment of schoolmaster, under an appointment by seven persons, not stated to be trustees: and the notice to quit by five is good, on behalf of the others, inasmuch as a notice by one of several joint tenants is sufficient. *Doe v. Summersett* (a). The appointment was, in fact, only by a majority of five out of the seven; and, admitting that they could convey an interest in land, it would be either an estate for life, as in *Doe v. Browne* (b), or at will, that is to say, until he should be dismissed by a majority of the persons seised. *Doe v. Jones* (c), and *Doe v. M'Kaeg* (d).

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On the issue as to the appointment on the terms and stipulations mentioned in the replication to the eighth plea—There was no agreement or stipulation, at the time of the appointment, as to the period during which the plaintiff was to occupy.

In arrest of judgment, on the second replication, the following grounds were stated:—

That the replication contained no statement of title, inasmuch as it omitted to allege a seisin in fee in the trustees—*English v. Burnell* (e), and *Roe d. Wrangham v. Hersey* (f); that the trustees who appointed the plaintiff were not named; that no power entitling the trustees to make the appointment was alleged; and that the trusts of the charitable fund mentioned in the replication, and the deed creating those trusts, were not set forth.

The Court granted a rule to arrest the judgment, and on the following day—

(a) 1 Barn. & Adolph. 135.

(b) 8 East, 165.

(c) 10 Barn. & Cress. 718.

(d) Ibid. 721.

(e) 2 Wils. 261.

(f) 3 Wils. 274.

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LORD LYNDHURST said—We have looked at the pleadings and the evidence, and are of opinion that the defendants should have a rule to shew cause upon the issues arising out of the fourth, seventh, and eighth pleas, and that they should not have any rule upon any other of the issues. I may state the grounds upon which that opinion of the Court is formed. It is unnecessary to say anything with respect to the plea of not guilty. The second plea is a plea of soil and freehold in ten persons named, including *Dester*. There is no issue taken upon the soil and freehold, but the replication alleges the soil and freehold to be in those ten persons in a particular character, *i. e.* as trustees of a charity, and in no other right; thus limiting the defendants' general allegation of soil and freehold. The rejoinder denies that the premises are the soil and freehold of the ten in that particular character. It appears to us, therefore, that the soil and freehold is admitted to be in the ten, and that the only issue is as to their character, whether or not the soil and freehold was vested in them as trustees. Now, then, as to the evidence. The deed of 1827 contains an appointment of the ten as trustees. *Dester* refused to accept the appointment, and to act under the trust, as he objected to some of the trustees, and would not act with them; but at the same time he refused to allow his name to be taken out of the deed, because it would have led to the substitution of another name. Now, if the soil and freehold were in the ten, and *Dester* was one of the ten, he could not take it absolutely, but must have taken it as trustee. If *Dester* took the soil and freehold, he took it as a necessary consequence of, and derived from, his character of trustee; and, therefore, by admitting the soil and freehold to be in the ten, it is also admitted to be in *Dester*, in that character.

Another point was made on the issue raised by the third plea: it was said, that the school-house was not conveyed

by the deed of 1827. By the deed of 1807, the land upon which the school-house was afterwards built was conveyed, and the words of the deed of 1807 and 1827, are the same. Looking at the two deeds, it is impossible not to say that there was an intention to convey the same property precisely in 1827 as had been conveyed in 1807. But then it is said, there is a misdescription as to the occupation. No doubt the description of the occupation is incorrect; but, as the words are sufficiently large to convey the whole of the property, we think the description as to the occupation will not vitiate. This opinion may be supported on the authority of several cases—*Doe d. Conolly v. Vernon* (a), and *Doe d. Tyrell v. Lyford* (b), and several other cases.

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The issue arising out of the fourth plea leads to the question as to the appointment: It appears, that, at a meeting of seven trustees, five concurred in the appointment, in opposition to the opinion and will of the other two. We think, that the question upon this issue is of so much importance, and is a question involving so much doubt, that a rule ought to be granted on that.

The issue arising out of the fifth plea raises the question of variance. The replication states the appointment of a schoolmaster, upon certain terms, viz. that he was to receive a salary of 40*l.* a-year, and to be entitled to a residence; and it is objected, that the salary of the schoolmaster was not proved to be 40*l.*, but only 20*l.* It is true, that the evidence was, that the salary of the schoolmaster was only 20*l.*; but it was also proved, that the schoolmaster was required to be a married man, and that his wife should act as schoolmistress, and teach the girls, at a salary of 20*l.*; the salary of the two, therefore, amounted to 40*l.*; that 40*l.* was substantially the property of the husband, and he was entitled to receive it. It appears,

(a) 5 East, 51.

(b) 4 Mau. & Selw. 550.

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therefore, to us, that there should be no rule upon the ground of a variance. But it was contended, that the plaintiff's office or appointment was an office incident or appurtenant to land, which would require to be conveyed by deed. It was not a freehold interest in the land; it was not an interest of that description; but the school-master's interest was to continue so long as he conducted himself with propriety, and his behaviour was good; and he was removeable from the school-house on a reasonable notice. He takes the office not as incident to the land, but accruing to him out of his nomination by the trustees, as part of the contract between them. If it were incident to the land, whoever had it would have the office, which is not the case. The word "office" has more than one legal meaning; it may have been improperly used here, as no assize would lie for this, which is properly an appointment only; no rule, therefore, should be granted on this objection.

The issues arising on the sixth, ninth, and tenth pleas all raise the question as to the validity of the dismissal. Each of the replications states the freehold to be in the defendant, in the character of trustees; and the question is, if the dismissal was regular. We think it was not, as no previous meeting was convened. It is unnecessary for us to consider, if the trustees had called a meeting, and had met, and a majority of the trustees had concurred in the resolution to dismiss, whether that would have been a valid dismissal. At such a meeting, discussion is presumed to take place; but here, four only of the trustees met, and gave the dismissal, and no opportunity was afforded for discussion; and, therefore, the act of the majority being done without a meeting regularly convened, seems insufficient and beyond their discretion as trustees. We think, therefore, on this point, that there should be no rule.

On the issues arising out of the seventh and eighth pleas, the defendants are alleged to be seised in fee of the

premises; but they are not clothed with the character of trustees—they are more than joint tenants, for, on evidence given, a Court of common law takes cognizance of what a trustee is. The plaintiff's interest seems to be neither for life, subject to defeazance, nor at will, but a middle term, viz. a right to the employment till dismissal by the trustees, or a majority of them. The question is, whether the appointment of five persons out of seven, not stated to be acting as trustees, or seised as such, but seised absolutely, is valid. On this we think that there is stronger ground for granting the rule than on the fourth issue.

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*Clarke, Adams, Serjt., Stephen, Serjt., Humphrey and Busby*, shewed cause.—The election of the plaintiff by five of the seven trustees was virtually an election by the whole body, as the two who dissented did not vote; *Oldknow v. Wainwright* (a); or, this being a public and charitable trust, an appointment by a majority of the existing trustees was valid. The argument *ab inconvenienti*, resulting from the obstinacy of a single trustee refusing to concur in an election, is here equally forcible, as in *Withnell v. Gartham*, and *The King v. Beeston* (b); and the case comes within the principle acted upon in *Grindley v. Barker* (c) and *The King v. Whitaker* (d), and adverted to by *Bayley, J.*, in *Blacket v. Blizzard* (e), that, if a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. *Co. Lit.* 49. a, and *Doe v. Jones* (f), shew that it was unnecessary to appoint the plaintiff by deed.

The eighth issue is proved, inasmuch as the number of

(a) 2 Bur. 1017; S. C. 1 Wm. Black. Rep. 229.

(b) 3 Term Rep. 592.

(c) 1 Bos. & Pul. 229.

(d) 9 B. & C. 648.

(e) Id. 859.

(f) 10 B. & C. 718.

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trustees is admitted, by the rejoinder, to be ten, and the plaintiff was not dismissed by a majority. The objections in arrest of judgment are cured, either by pleading over, or by verdict. The rejoinder cures the omission to state title, and the ambiguity that the premises are the defendants' soil and freehold. *Hobson v. Middleton* (a), *Avery v. Hoole* (b). Nor is the allegation of soil and freehold more ambiguous than seisin, or seisin in fee.

*Goulburn, Serjt., and M. D. Hill, contra.*—On all the issues, except the seventh and eighth, it was incumbent on the plaintiff to establish his due appointment to the office of schoolmaster, and no due appointment was proved. The concurrence of a majority of the trustees in the election was insufficient, as this was not a public trust, but a private foundation; in which respect, it differs from *Grindley v. Barker*, and *The King v. Beeston*, and is clearly within the doctrine laid down in *Co. Lit.* 112. b. [Lord *Lyndhurst*, C. B.—Your argument must go to this extent, that, where the objects of a charity are of a public nature, and enumerated, but the funds are only of a private nature, a majority of the trustees cannot bind the minority.] The bequest of funds by a private person, to other like persons, though for the benefit of the public, does not make the trust public. *Cook v. Loveland* (c). The distinction between a public and private trust was taken in *Curtis v. The Kent Waterworks* (d), *The King v. Whitaker*, and in *Blacket v. Blizard*. The election in *Oldknow v. Wainwright* was by a corporate body duly assembled to exercise their elective franchise, and therefore that case does not apply. *Owen v. Saunders* shews that the appointment to this office by parol was bad, as it was

(a) 6 B. & C. 295.

(b) Cowp. 825.

(c) 2 Bos. & Pul. 31.

(d) 7 B. & C. 314.

an office taking effect out of, and as coupled with, an interest in land. *Each. of Pleas, 1832.*

On the eighth issue, the verdict cannot be supported, as it is not stated who the persons are, in the majority of whom a right to dismiss is alleged, nor that they were any of those by whom the plaintiff was appointed. It is also alleged, that seven persons were seised in fee of the land, from whom it appears on the pleadings that an interest in land passed; but the evidence is, that five only professed to part with that interest. The plaintiff, as in *Doe d. Warner v. Brown*, must have either an estate for life, which could not be created, except by deed, or a tenancy from year to year, determinable by a regular notice to quit, which has been determined by notice from the five trustees. *Doe v. Summersett, Doe v. Jones, Doe v. M'Kaeg.* The education of poor children is not one of the purposes of the charity, as directed by the words, "relief of the poor," which must be limited to bodily relief of the poor, such as is afforded by the poor laws, and would go in diminution of the poor-rate, and the doctrine of *cy pres* does not apply. Judgment should be arrested, because all the replications, except the seventh and eighth, are bad; as the legal title of soil and freehold set out in the plea are confessed, but are not avoided by the statement of another and a better title. The plaintiff claims a particular estate, created by the "then trustees," but does not shew a derivative title from a seisin in fee. The title, as trustees, is merely equitable; and, therefore, this is a defect or omission to state any title, which would be bad on demurrer, and not an ambiguity as in *Huntingtower v. Gardiner* (a), or a title defectively or inaccurately stated, as in *Harris v. Beavan* (b). The first seisin in fee should have been clearly stated; *King v. Coke* (c), *Lambert v.*

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(a) 1 B. & C. 297.

(b) 1 M. & P. 633; S. C. 4 Bing. 646.

(c) Cro. Car. 384.

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*Stroother* (a); soil and freehold does not shew the estate, or the commencement of it. 1 *Saund.* 347, n. (6). *Ward v. Harris* would only cure the statement that the defendants were "trustees of a certain charitable fund;" and in that case Lord *Eldon* differed from the other Judges. The omissions, therefore, are not cured by verdict or pleading over. *Rushton v. Aspinall* (b), *Buxendin v. Sharp* (c), *Avery v. Hoole*, *Jackson v. Pesked* (d) per Lord *Ellenborough*, C. J., *Butt v. Howard* (e), *Mitchell v. Walker* (f).

The Court took time to consider, and now judgment was delivered by—

LORD LYNTHURST, C. B.—One of the points argued at the bar, and which stands for the decision of the Court, is, whether or not the plaintiff was duly appointed master of the school, which is the subject of this inquiry. A charity was established in the reign of *Henry* the Sixth, and certain trustees were appointed, to whom certain estates were conveyed for certain purposes specified, viz. for the relief of the poor, the repair of the church and highways, and of a particular bridge, and to pay the fifteenths, when it should be required, to defray the expenses of soldiers. Thus, all the objects I have enumerated, were objects of a public nature, to which these trustees were appointed, to take certain estates and apply their produce to them. It has been considered for many years, that, under that part of the trusts which enabled the trustees to apply these funds for the relief of the poor, they were at liberty to apply part of the funds to instruct the poor children of the parish. A school-house has been accordingly built, and those poor children have been in-

(a) *Willes*, 218, 225.

(b) *Doug.* 658.

(c) 2 *Salk.* 662.

(d) 1 *Mau. & Selw.* 234.

(e) 4 *Barn. & Ald.* 655.

(f) 5 *Term Rep.* 260.

structed at that school. We are of opinion that that application of the funds comes within the terms of the trusts; and that, where trustees are appointed to apply funds for the relief of the poor of a parish, they may, in the exercise of their discretion, apply those funds, or part of them, for the education of the poor children of the parish; that being an applying the funds for the relief of the poor, within the language of an instrument of this description. Now, in this case, at the time when the plaintiff was appointed schoolmaster, there were seven trustees: those seven trustees met for the purpose of electing a schoolmaster. At that meeting, five of the seven trustees concurred in his appointment, and two dissented, but did nothing upon that dissent. It was stated merely in evidence, that five concurred, and two dissented; but the latter did no act, as it appears in the evidence, consequent upon that dissent. It is unnecessary, however, in the view which we take of the subject, to say whether or not that is to be considered as a concurrent election by the seven, because we are of opinion, that, in a case of this description, where all the trustees were assembled for the purpose of making the election, and the majority of them so assembled concurred in the appointment of a schoolmaster, the act of the majority, in that respect, is to be considered as the act of the whole body. This is a trust of a public nature, and we are of opinion, that, when trustees are appointed for the purpose of performing a trust of a public and general nature like this, the act of the majority is the act of the whole. In the case of *Grindley v. Baker*, *Eyre*, C. J., says, that, where persons are intrusted with powers of a general nature, and they all meet for the purpose of performing their duty, the act of the majority is the act of the whole. That case was recently cited in *Curtis v. The Kent Waterworks Company* by one of the learned Judges, and was adopted by him and apparently by the whole Court. We are of opinion that this

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is a public trust, or of a public nature, namely, a trust to apply funds for the repair of the church, and for other subjects in which the whole parish were interested; therefore, we think it comes within the principle to which I have referred. But it was said at the bar, that the principle only applies to cases where the trustees are appointed under some public authority, as, under an act of Parliament or some public body. We are of opinion that it is not subject to that limitation; and in fact, in the *Shipton School case*, *Withnel v. Gartham*, the charity was founded, and its officers were appointed, not by any public authority, but, as in the present case, by an individual. It is true, in that case, the churchwardens and vicar for the time being were the trustees, and that the churchwardens usually acted by a majority; but that was merely made use of as a circumstance from which it was to be inferred that the intention of the donor was, that the act of the majority should bind the whole, and should be considered as the act of the whole body. Other circumstances were also there relied upon, namely, that the objects of the trusts would be defeated if one dissenting trustee should prevent the application of the funds in the manner directed by the trusts. Now, that would apply equally in this case, and, considering the nature of the trusts, we are of opinion, that it was the intention of the founder, and fairly to be collected from the objects he had in view, that the act of the majority of the trustees should bind the rest.

The next question that arises for consideration, arises on the ninth and last issues, being, whether the master was duly and properly dismissed. Now, the dismissal was in this form: there was no public meeting, nor any declaration by a majority assembled at a public meeting, that the schoolmaster should cease to act in that situation; but five out of the trustees, not assembled in that formal manner, gave notice that the schoolmaster should, within a certain time, retire from his office. In the first place, at the time

when the notice was given, there were ten trustees, so that the persons who gave notice did not even constitute a majority of the whole body. In the next, even if they did constitute a majority of the whole body, it is the whole body that is to dismiss, and not a majority of it. So that, if there is a meeting, and a majority are for dismissal, then the declaration of the majority is not merely the declaration of the majority, but of the whole body; which whole body does, in fact, dismiss. Therefore, in a case of this description, where there was no meeting, and where five individuals gave their opinion, or said that the dismissal should take place in a short time, or that the party should cease to act as schoolmaster, we are of opinion that that is not a valid dismissal within the meaning of this trust.

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Both notices stand on the same footing, and are governed by the same principles. Though I have hitherto stated the second question to relate to the dismissal of the schoolmaster, the actual terms of the last issue are, whether the interest and right of possession were lawfully put an end to and determined before the trespass complained of. And it becomes material, therefore, to consider next what his interest and right of possession were. He was appointed at the salary of 40*l.* a year, and with permission to occupy the dwelling-house, and a right to occupy it as long as he continued schoolmaster. That occupation was incident to his appointment of schoolmaster, and he had no interest in the house distinct from his interest of appointment of schoolmaster; as soon, therefore, as he was properly removed from his office of schoolmaster, we should in effect decide that his interest and right of possession in the premises had ceased. Another question, however, arose out of the form of the issue, which was this, that the assembly did not duly appoint the plaintiff upon the terms, among others, that he should hold till dismissed by a majority; and in that issue, and upon that replication, nothing is stated with respect to the trustees; but it is merely stat-

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ed, that the parties were seised, without stating that they were seised as trustees. However, we do not conceive that that makes any difference on the evidence produced. The trust deed under which the schoolmaster was appointed, was produced, or assumed to be produced. That deed limits the nature of the appointment, and regulates also the manner in which he may be dismissed; and the evidence under it is not at all inconsistent with the statement of the title and the right stated on the face of the replication: the legal title stated in the replication corresponds entirely with what appears in evidence. We are of opinion, therefore, that this ranges itself precisely within the decision on the former point; and that, though on the face of the replication they are not stated to be seised as trustees, yet sufficient appears for this purpose. By the production of the trust deed upon the trial, and the nature and limitation of the appointment, and the right of removal, as evidenced by that trust deed, the Court entertain no doubt but that an appointment to the situation of schoolmaster may be made without writing.

The remaining question which has been argued arose upon the motion in arrest of judgment. The plea was *liberum tenementum*; the replication was *liberum tenementum* (in the same person), to which was added a deduction of title; and the question is, whether, after verdict, it is sufficient, without having first alleged that they were seised in fee; and then, after deducing a regular title, that the trustees who were so seised in fee regularly appointed by a majority the schoolmaster; but, instead of stating a seisin in fee, the premises were stated to be the soil and freehold of certain trustees, and that those trustees were appointed previously to the election by the majority. It is not disputed, I think, at the bar; and it is quite clear, that to have stated a seisin would have been sufficient after verdict. We think, therefore, that, it having been stated that it was their soil and freehold in the replication, is

cured by verdict, as much as it would have been cured if a general seisin had been stated, without stating a seisin in fee. We are of opinion, therefore, that the rule should be discharged.

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Rule discharged.

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**D**EBT for the balance of an account for axle-trees and springs delivered. Plea, the general issue, with notice of set-off for eight axle-trees and eight bundles of steel returned and delivered to the plaintiff, as per invoices sent to him, and for cartage thereof to the defendant's premises from the canal wharf. The venue had originally been laid in *Yorkshire*, had been changed to *Middlesex*, and retained in *Yorkshire*, upon the usual undertaking to give material evidence in that county.

An undertaking to give material evidence in the county in which the venue is retained, in an action for goods sold and delivered, is satisfied by proof of letters, containing invoices of goods, having been put into the post office in that county at the time the goods were forwarded.

The cause was tried in *Yorkshire*, before *Bolland, B.*, when it appeared that the plaintiff was an iron master at *Sheffield*, and the defendant a coach-spring smith in *Curtain Road, Middlesex*. The plaintiff proved a contract in *Middlesex* for the sale of the axles and spring steel, to be delivered by the plaintiff at a wharf in *Islington*, and that the goods in question were delivered at the defendant's premises in *Curtain Road*. The plaintiff's book-keeper then proved that he made out two invoices containing an account of the quantities, prices, &c. of the goods, which he sent by post addressed to the defendant at *Shoreditch*, on the same day on which the goods were forwarded by water; and that the charges were the current charges of the day. Notice was given to produce these invoices, which were

A defendant was arrested for 37*l.*, the amount of goods sold and delivered. The defence was, that the goods were of bad quality and had been returned to the plaintiff, who sent them back. The plaintiff recovered 15*l.* only; and, upon an affidavit, uncontradicted, that the defendant had objected to the quality of the goods, and the plaintiff had agreed to take

them back:—*Held*, that the defendant was entitled to costs under the statute 43 *Geo. 3*, c. 46, s. 3, the arrest being without reasonable or probable cause.

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not produced, and the contents were read from the plaintiff's invoice book. The steel was therein described as warranted. The defendant twelve months afterwards returned a part of the goods (those alluded to in the set-off), and offered to pay the balance due after deducting the returned articles, but did not request that the goods objected to should be changed or altered. These goods were, three months afterwards, returned to the defendant by the plaintiff, who had been prevented from doing so earlier by an accident. They were directed to the wharf and delivered to the defendant. The defence was, the bad quality of the steel, and an agreement by the plaintiff to take it back.

The learned Baron thought at the trial that material evidence in *Yorkshire*, to satisfy the undertaking, had not been given, and nonsuited the plaintiff after the jury had found, that, if any thing, 15*l.* only was due, for which sum he gave the plaintiff leave to move to enter a verdict.

*John Williams* accordingly moved for and obtained a rule to enter a verdict for the plaintiff for 15*l.*, against which—

*Jones*, Serjt., and *Rotch*, shewed cause.—The plaintiff must give *material* evidence as to part of the cause of action in *Yorkshire*—*Santler v. Heard* (a). The carrier was the agent of the consignor, and not of the consignee; and, therefore, the contract and delivery here were in *Middlesex*. This distinguishes the present from the case of *Powell v. Rich* (b). Merely sending the invoice from *Yorkshire* was immaterial, until something was done upon it in *Middlesex*: as well might there be said to be material evidence in every county through which the letter passed.

*J. Williams*, and *Heaton*, *contrà*.—Evidence material to

(a) 2 W. Bl. 103.

(b) 2 Marsh. 494.

part of the cause of action is sufficient to satisfy the undertaking—*Per Burrough, J.*, in *Smith v. Walker* (a). The mere delivery entitled the plaintiff to a verdict for nominal damages only, and the value of the goods furnished by the invoices was essential to the plaintiff's case. If so, the evidence material was in the county where the letter was posted. *Rex v. Burdett* (b).

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BAYLEY, B.—It seems to me that this rule ought to be made absolute. The case is by no means one of hardship, as the defence set up rested upon the bad quality of the goods; and if the plaintiff thought that the defendant would produce evidence on that head, he knew that his witnesses, to answer that objection, must all come from Sheffield, as the articles were all manufactured there; and it must be presumed that persons in his line of business residing there, were the only persons who could speak to that question. In my opinion, the sending of invoices from *Yorkshire*, addressed to the defendant in *London*, was material evidence for two purposes, one to shew the quantity and nature of the goods furnished, and the other the price which the plaintiff insisted the defendant undertook and was liable to pay. I agree that sending an invoice does not bind a defendant, if he point out any misrepresentation, as in the quantity or price; but, when there is reason to believe that an invoice has been received, and no answer is returned, that is *prima facie* evidence that the number of articles specified were sent, and that the price stated is the price agreed to be paid; now, the invoice here specifies the articles, with their prices. What, in the ordinary course of dealing, would be the consequence naturally arising from sending invoices in letters addressed to the defendant? Why, in all human probability, that they would reach their destination; and, if they

(a) 8 Taunt. 169.

(b) 4 B. & A. 95.

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did, and the defendant remained silent, that would be an acknowledgment, *prima facie*, that the goods had reached him, and that the prices charged were the correct prices. Here, there was no evidence of any answer. Then, is not that evidence to go to the jury, that the invoices did reach him? But, suppose they did not reach the defendant, as there is no doubt the goods were sent and received, would not that be good ground for the defendant to remonstrate and to complain? But no complaint was made, and the absence of complaint was strong confirmatory evidence, to induce a belief that what would occur in the regular and ordinary course of business did occur. Then, the evidence, by reference to the book, that invoices, specifying the quantity and prices of the goods, were sent, seems to me material, because it raises *prima facie* evidence of the quantity and prices of the goods sold, and furnishes the means to the jury of fixing the amount of the verdict. Suppose the plaintiff's book-keeper had proved that some of the goods only were sent, or had proved all, and not the prices, there must then have been further, and might have been contradictory evidence; and the jury might have found a verdict for a less amount, upon evidence by no means so satisfactory. The invoices removed all difficulties in these respects, and, in my opinion, therefore, were material evidence for the plaintiff.

VAUGHAN, B.—I think the undertaking was satisfied. To see whether the evidence was material, it is important to look at the issue. The question there is, upon the sale and delivery of goods; and also, as it was objected that they were not of the quality contracted for, and some had been returned for that reason, to sustain his cause of action, the plaintiff was bound to make out that he had delivered goods such as the defendant was bound to take and to pay for. The question is, whether the testimony of *Ascham*, the book-keeper, was to any material fact arising in the county. He

proved that he was directed to make out and inclose the invoices; that he did so, and put them in the post in *Yorkshire*; that part of the goods were returned, and were sent back to the defendant. Is it not material that the goods were returned to *Yorkshire*, and were afterwards properly sent back by the plaintiff from that county? and is it not material that a part payment was made there also? It has been held, that the undertaking to give material evidence in *Middlesex* is complied with by the production of a rule for payment of money into Court—*Watkins v. Towers* (a), or of a commission of bankruptcy tested at *Westminster*—*Kennington v. Chantler* (b); so also the production of the writ in an action for an escape (c). In all the cases, it may be admitted to be laid down, that there must be some evidence that is material; but, if it be so, we cannot discuss the quantum of materiality. If any one fact material to the issue be proved to have arisen in the county, that is sufficient.

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BOLLAND, B.—There is one part of this case that strikes me forcibly. The invoices were material evidence even for the defendant, as they stated the steel to be warranted, and so laid the foundation for his defence, that it was of an inferior quality. The goods were sent back by the defendant for that reason; and it then became absolutely necessary, as the plaintiff knew that the quality was in contest, to shew that he acted promptly in returning the goods. How would the case have stood, if *Ascham's* evidence had been taken away? Why, the defendant could have shewn that the goods were sent back, and would have traced them down to the warehouse of the plaintiff; whence the fair inference would have arisen, that he adopted the complaint made by the purchaser, and that he ad-

(a) 2 Term Rep. 275.

(b) 2 Mau. & Selw. 36.

(c) *Anon.* 2 Chit. Rep. 418.

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mitted the fact that the goods were such as he ought not to have furnished. Taking this evidence away, therefore, the plaintiff would have been subject to the loss of his goods, and, therefore, I cannot but consider it material.

Rule absolute, to enter a verdict for 15*l.* 11*s.* 5*d.*

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*Platt*, on a subsequent day, obtained a rule for costs under 43 *Geo.* 3, c. 46, s. 3, on affidavits, stating that the defendant was arrested for 37*l.*; that he was unable to use the axle-trees and steel which he had returned to the plaintiff, on account of their bad manufacture; and that the plaintiff had agreed to take them back in *April* or *May*, 1830; that they were sent back in *August*, 1830, to *Sheffield*, and taken by the plaintiff's carman from the wharf, and were again returned to a wharf in *London*, on the 14th of *December*, 1830.

*J. Williams* and *Heaton* shewed cause.—A plaintiff is not within the act, in an action for goods sold and delivered, by reason of the inferiority of the articles; or, if he were, as the quality of the steel was here the only question in dispute, and that was found for the plaintiff, he had reasonable ground of action.

*Platt* and *Rotch*, *contrà*.—The plaintiff does not shew affirmatively that he had reasonable and probable cause to arrest the defendant for so large an amount, as the defendant's affidavits expressly state an agreement by the plaintiff to take back the goods.

PER CURIAM.—Before the arrest, the defendant objected to the quality of the goods, upon which, as the defendant's affidavits state, the plaintiff agreed to take them back. Although the verdict has applied that agreement to the

axle-trees only, there does not appear to have been reasonable or probable cause for arresting the defendant for the whole sum.

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Rule absolute.

WADSWORTH v. MARSHALL and Another.

**THIS** was an action by the assignee of a bankrupt against the sheriff of *Middlesex*, for goods taken in execution. After notice of trial for the Sittings after *Easter Term*, and a countermand—

The plaintiff obtained a rule, calling upon his attorney to shew cause why he should not proceed with the action.

The attorney, in his affidavit in opposition to the rule, stated, that, after he had given notice of trial, he had read in a newspaper the report of a trial at the *Old Bailey*, which induced a suspicion that the action was not a creditable one; and he was led to suppose, from inquiries he had made, that the plaintiff was in insolvent circumstances; that he had received a notice from the defendants of their intention to dispute the bankruptcy, which would render further evidence necessary on the part of the plaintiff, and increase the expense of going to trial; and that he had, in consequence, required a further advance of money for that purpose, which he had not received; by reason whereof he had countermanded the notice of trial.

An attorney who has undertaken a cause, is not bound to proceed without adequate advances from time to time by his client, for expenses out of pocket; and, therefore, the Court will not compel an attorney, even after notice of trial, to carry the cause into Court, unless the client supply him with sufficient funds to pay the expenses out of pocket thereby incurred.

*Knowles* shewed cause, submitting that the old rule, as laid down in *Tidd's Pract.*, 9th edit., that, when an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw, although his client neglect to bring him money, no longer prevailed; and he cited the decision of Lord *Tenterden*, C. J., in

*Exch. of Pleas,* **Rowson v. Earle** (a), that an attorney is justified in refusing to proceed with a cause, unless funds are supplied.

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The plaintiff, in person, relied upon the old rule, and objected that the case cited was merely a *Nisi Prius* decision; and he also took a distinction between a suit in *Chancery*, which might be of indefinite length, and was usually attended with a large outlay, and an action at law, of the probable duration and expense of which it was easy for an attorney, when undertaking the cause, to form a judgment.

BAYLEY, B.—The impression of my mind upon this subject is, that the attorney is not entitled arbitrarily to abandon a cause at any stage of it he may think fit, and to insist on payment of his bill up to that period; but, if he has good ground, he may do so, and may recover the amount of his bill. According to the ordinary way of looking at the retainer of an attorney, I do not believe that there is any rule which requires the attorney to advance all the money necessary to carry on the cause out of his own pocket. If such a rule were understood to exist, its operation, in point of practice, would be to induce attornies—at least in all causes of probable length or expense—to insist on having the necessary funds put into their hands, before they undertook to conduct the case. This would be a great injury to clients, and in many instances an impediment to justice. My notion of the rule is, that an attorney has a right to call upon the client, from time to time, on reasonable notice, to make advances, and, for the purpose of taking the cause to trial, to supply him with adequate funds, not to pay his costs, but the expensès out of pocket. There are many cases at the Assizes, in which these ex-

(a) 1 M. & M. 538.

penses, on carrying the cause into Court, are very considerable, which would fall heavily on the attorney, if he had not a right to require an advance from his client.

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The rest of the Court concurring, the rule was—

Discharged, on the attorney undertaking to proceed with the cause, on payment by the plaintiff of such sum of money as the Master should find to be necessary to pay the costs out of pocket, on trying the cause; and security to be given by the plaintiff, to the satisfaction of the Master, for payment of the attorney's costs within one week (a).

(a) See *Vansandau v. Browne*, 2 Moore & Scott, 543, where this point was expressly determined in the Court of *Common Pleas*.

### DOE d. HEMMINGS v. DURNFORD.

**EJECTMENT** on a demise of the 14th *January*, 1832, for a forfeiture for non-repair of the premises, under a covenant in a lease by the lessor of the plaintiff to one *Wolsley*.

At the trial, before *Gurney*, B., it appeared that the defendant had recently become tenant of the premises, and had made payments of rent to the amount reserved by the lease, to the lessor of the plaintiff. On the 2nd of *January*, 1832, a distress was put in for three quarters' rent in arrear, due on the 25th of *December* preceding; and the broker in possession stated, that, when he quitted the premises on the 7th of *January*, a great part of the flooring of the house, and some of the doors and windows, were removed, and that the premises were much out of repair.

In ejectment for a forfeiture, under a covenant to keep in tenantable repair, it is not necessary to shew that the premises were not in repair on the day of the demise; but, if proved to be out of repair a short time previously, it is incumbent on the defendant to give evidence that they have been put into repair before the right to re-enter accrued.

What is sufficient evidence of privity, to render a party in possession liable, as assignee of a lease, for a forfeiture in an action of ejectment.

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A counterpart of the lease was produced by the plaintiff; and the defendant's counsel did not deny that the defendant was not in possession as assignee; but, in his address to the jury, urged the hardship of a forfeiture on the defendant as such assignee; and also contended, that, in point of law, it was incumbent on the plaintiff to shew that the premises were out of repair on the day of the demise. The learned Judge told the jury that a *prima facie* case had been made out by the plaintiff, which called upon the defendant to shew that the premises were in tenantable repair after the 7th of *January*; and a verdict, thereupon, having been found for the plaintiff, now—

*Mansel* moved for a new trial.—No sufficient evidence of privity of estate was given, to render the defendant liable under the covenants of the lease as assignee, since the mere payment of rent implies a tenancy from year to year; and, in an action of ejectment, mesne assignments will not be presumed.

*Secondly*—The plaintiff was bound to shew by a surveyor, or some person competent to form a judgment, that the premises were out of tenantable repair, and also that they were so out of repair after the distress, which was a waiver of the forfeiture, either on the day of the demise, or at least a very short time before—*Adams on Ejectment*, 74.

BAYLEY, B.—I cannot say I entertain any doubt on either point. On the first point, I consider that there was sufficient to shew a privity between the defendant and the lessor, and that the defendant was in under the lease. The lease was produced, and was at once admitted by the defendant's counsel. The lease came out of the custody of the lessor of the plaintiff, and was executed by the original tenant; and the admission by the defendant shews that he was cognizant of it. The defendant was in possession of the premises, and it turns out that he was in the habit of paying the rent reserved by the lease. I am of opinion,

then, that there were circumstances which made out a *prima facie* case of privity. Then comes the question, whether there was any forfeiture, and whether there was a waiver of that forfeiture; it is clear that the premises were out of repair on the 7th of *January*, which no doubt was a ground of forfeiture. Up to the 25th of *December*—I may say up to the 2nd of *January*, when the entry under the distress was made—the tenancy continued; but there may be a description of forfeiture *de die in diem*; and, if a neglect to repair continues from day to day, that is a continuing cause of forfeiture. There are two cases which may be referred to upon this subject:—*Doe d. Bryan v. Banks* (a), and *Doe d. Sir Charles Flower v. Peck* (b); in the latter of these cases, there was a covenant to insure the demised premises, and keep them insured during the term. The premises were never insured previously to a distress for rent, and the parties continuing to suffer them to remain uninsured *de die in diem* after that distress, it was held that this was a continuing breach, for which the lessor might recover in ejectment, on a demise subsequent to the distress. Now, in this case, after the time of the distress, there was no new waiver of the forfeiture. It was proved, that, on the 7th, the premises were in an improper state of repair; and there was no evidence to shew that after that period any thing was done to repair them. If the premises had been repaired, the defendant might have proved it; and I think it was incumbent on him so to do.

*Exch. of Pleas,*  
1832.

DOE  
d.  
HEMMINGS  
v.  
DURNFORD.

VAUGHAN, B.—I think the verdict right. I at first doubted upon the question of privity; but now I think there was sufficient evidence. The counterpart of the lease being found in the possession of the lessor of the plaintiff, was one step towards making that out; the payment of the same rent was another; and the possession of

(a) 4 Barn. & Ald. 401.

(b) 2 B. & Ad. 428.

*Exch. of Pleas,*  
1832.

DOE  
d.  
HEMMINGS  
v.  
DURNFORD.

the party was a confirmatory circumstance. On the other point, I think the jury had sufficient evidence before them to be satisfied that a forfeiture had accrued, and that it was for the defendant to shew that the premises were subsequently repaired.

BOLLAND, B.—I am of the same opinion. The objection, that no privity was established, was not pressed at the trial, because it was put to the jury as a case of hardship upon the defendant as assignee. It is too late, therefore, to make that a ground for a new trial now, upon which further evidence, had the objection been urged, might have been offered at the trial. As to the state of repair, the condition in which this house stood, was proved by the evidence of the broker, who, in my opinion, was a competent witness; and, as such a house must get worse and worse every day, and the defendant did not shew that he had taken any steps to repair it, or that he had ordered workmen to go in for that purpose, it must be assumed that it remained in the same state.

Rule refused.

### DOE v. ROE.

Where several tenants in possession are served with separate copies of an ejectment, one rule is sufficient against the casual ejector.

**T**HERE were two tenants in possession of the premises sought to be recovered by this ejectment, and a separate copy of the declaration in ejectment, and notice was served upon each.

*Lumley*, who moved for judgment, said, that it had been doubted whether two rules were not necessary in such a case, but suggested that one was sufficient. And so the

COURT agreed, observing that it was but one ejectment; and that service upon one of several joint tenants was good as to all.

Rule accordingly.

*Exch. of Pleas,*  
1832.DOWSON *v.* CULL.

**T**HE plaintiff having taken an assignment, and proceeded on the bail-bond—

*Humphrey* moved to stay proceedings thereon, upon payment of costs, bail above having been perfected. He had only the affidavit of one of the bail below, who swore that the application was made without any collusion or concert whatsoever with the defendant.

In an application by bail, to stay proceedings on a bail-bond, collusion with the defendant must be denied by both the bail.

*Thesiger* contended that there should be an affidavit from both the bail, denying collusion. Upon which—

*Humphrey* prayed time to obtain such an affidavit. Time was granted, but the affidavit was not produced. Upon which—

BAYLEY, B., said, that the affidavit of one of the bail was consistent with collusion and concert between the defendant and the other bail. And, as the Court never interfered without an express affidavit to satisfy them that the application was made purely on the behalf of the bail, at their instance, for their indemnity, and at their expense, without collusion with the defendant, the rule must be—

Discharged.

*Exch. of Pleas,*  
1832.

WEALD v. BROWN.

The Court will not set aside a final judgment by default, in an action of debt, by reason of no writ of inquiry having been executed, unless it appear clearly that the action was not for a sum certain.

**HOGGINS** had obtained a rule to shew cause why the final judgment by default, and all subsequent proceedings, should not be set aside, on the ground that the judgment had been signed without any writ of inquiry. The affidavit stated that the action was in debt, for the amount of an apothecary's bill.

*Kelly* shewed cause, submitting, that, as in actions of debt the plaintiff was in general entitled to final judgment without a writ of inquiry, it was for the defendant to shew explicitly that this case was an exception, and one in which a writ of inquiry was necessary.

*Hoggins, contra*, contended that a writ of inquiry was necessary, citing *Arden v. Connell* (a), and *Brill v. Neele* (b), and referring to the opinion intimated by *Bayley, J.*, in the latter case, that if, in debt on a *quantum meruit*, or in other cases, where a sum certain was not declared for, execution were issued, without first executing a writ of inquiry, it might be ground of error, or at least would be irregular. [*Bayley, B.*—How does it appear that the declaration was on a *quantum meruit*, and not for a sum certain?] It must be inferred that debt for an apothecary's bill is upon a *quantum meruit*.

**BAYLEY, B.**—This objection is sufficiently answered by saying that this is an action of debt. There is no doubt, that, in certain cases of actions of debt, some of which are referred to by my Brother *Holroyd*, in *Brill v. Neele*, and *Arden v. Connell*, a writ of inquiry is requisite. If, from the nature of the contract, the amount must of necessity

(a) 5 Barn. & Ald. 885.

(b) 2 Chit. 619.

be uncertain, then, in an action of debt, as well as in other actions, there must be a writ of inquiry to reduce it to certainty. An apposite case is an action of debt for not setting out tithe, where the jury must ascertain the single value, before the Court can give to the defendant the treble value of the tithes. But this is an exception to the general rule, that, in actions of debt, the plaintiff is entitled to consider the amount specified as the real debt, and that there is no reason for a writ of inquiry to inform the conscience of the Court. In *Taylor v. Capper* (a), where execution had been levied without any writ of inquiry executed in an action of debt, wherein the defendant had suffered judgment by default through a mistake in having pleaded *non assumpsit*, the Court decided that a writ of inquiry was not necessary. It is impossible for us to say, without any thing to shew that the declaration was so framed as to render a writ of inquiry essential, that this judgment, for the want of it, was irregular.

*Exch. of Pleas,*  
1832.

WEALD  
v.  
BROWN.

VAUGHAN, B.—There is nothing before the Court to shew, that in this action the debt was of such a nature as to require a writ of inquiry to ascertain its precise amount. That can be collected from inference only, which is not enough to bring this case within the exception to the rule, that the sum declared for is the true debt.

Rule discharged.

(a) 14 East, 443.

*Exch. of Pleas,*  
1832.

DOE *d.* BARKER *v.* GOLDSMITH.

*W.B.* bequeathed certain leasehold premises to trustees, on trust to permit and suffer his wife to receive the rents, &c. during her life. Afterwards the surviving trustee and the widow granted a lease of the premises, the rent to be paid to the widow, and the lessors to have a power of re-entry upon non-payment of rent; the lease disclosed the title of the widow, who, after the death of the trustee, entered on the premises:—

*Held*, that being a stranger to the legal estate, the power of re-entry could not be reserved to her, and that the lease operated as a lease by the trustee and a confirmation by the widow.

**WILLIAM** Barker, by his will, dated in 1816, bequeathed to *J. Roberts* and *J. Shirven* certain premises in *Duval's Lane, Islington*, their executors, administrators, and assigns, for the residue of a term, upon trust to permit and suffer his wife *Sarah Barker* to have, take, and receive the rents, &c., during her natural life, if she should so long continue a widow; and from and after her death or future marriage, on trust to sell the same, and divide the produce between *H. Barker* and *J. Barker*, his sons; and appointed *Roberts* and *Shirven* executors of his will. *Shirven* died before 29th September, 1823; on which day, by indenture of lease between *J. Roberts*, therein described as surviving executor of *William Barker*, *Sarah Barker*, therein described as widow of the said *William Barker*, and *H Barker*, devisee and residuary legatee named in the last will of the said *W. Barker*, of the first part, and *J. Goldsmith*, of the other part, reciting an assignment in *August*, 1816, from *Hartwell* to the testator *W. Barker*, of a lease of the above premises to *Hartwell*, dated *November*, 1807, for fifty-two years, and also the dispositions in the will of *W. Barker* deceased, they the said *J. Roberts*, *Sarah Barker*, and *Henry Barker*, demised the said premises to the defendant, at a rent payable to *S. Barker* and *H. Barker*, and the survivor of them, and the executors of such survivor; and with a proviso for re-entry by *J. Roberts*, *Sarah Barker*, and *Henry Barker*, and the survivor of them, and the executor of the survivor, in case of non-payment of rent. After this lease, *J. Roberts*, the surviving executor, died, and the rent not being paid, *Sarah Barker* brought an ejectment on the proviso upon her sole demise. The cause was tried before *Gurney, B.*, at the *Middlesex* Sittings, and a verdict was found for the lessor of the plaintiff, with liberty for the

defendant to move to enter a nonsuit, it being contended that she was a stranger to the legal estate, and so that a right of re-entry could not be reserved to her. *Doe d. Barber v. Lawrence* (a), *Doe d. Barney v. Adams* (b).

*Exch. of Pleas,*  
1832.

DOE  
d.  
BARBER  
v.  
GOLDSMITH.

*Humfrey* having obtained a rule accordingly.

*Hoggins* shewed cause.—The statute of uses does not apply to this, which is leasehold property; and the trustees having joined in the lease with the lessor of the plaintiff, the rent being payable to her and her son, the assent of the trustees to the receipt of rents by the lessor of the plaintiff appears by the lease, and an assignment by them to her must be presumed. It was the intention of the testator, as evinced by the words “on trust to permit and suffer (the lessor of the plaintiff) to receive the rents” during her life or widowhood, to vest in the widow an estate for life, defeasible by her second marriage: and so she has the legal estate, and a power of re-entry might be reserved to her. But the intention of the parties to the lease was, that the lessor of the plaintiff should receive the rents and profits, and should re-enter on their non-payment. It thus operates as an assignment from the executor to the lessor of the plaintiff for her life, and as a lease from her to the defendant during her widowhood. In *Burton v. Barclay* (c), a deed was allowed to have the double operation of passing a fee, and also a chattel interest, in order to carry the intent of the parties into effect.

[*Bayley, B.*—The bequest of a leasehold to the trustee vests the legal estate in the trustee. *Comyns*, in his *Digest*, tit. *Devise* (I) says, “A devise to *B.* to the use of another is good to the *cestui que use* ;” and in tit. *Uses* (C), he affirms that a man may raise uses by will, for he may

(a) 4 Taunt. 23.

(b) 2 C. & J. 232.

(c) 5 Moore & P. 785; S. C. 7

Bing. 760.

*Exch. of Pleas,*  
1832.

DOE  
d.  
BARKER  
v.  
GOLDSMITH.

devise lands to the use of another: but he there speaks of interests of immediate freehold.]

*Humfrey contra.*—The lease recites the interest of Mrs. *Barker*, and shews that it is equitable only. A power of re-entry cannot be reserved to a stranger to the legal estate: but, if her estate is sufficient to support such a power, so will that of her son *Henry Barker*, though it only arises on her death or second marriage. The defendant, by executing the lease, is not estopped from shewing, that, upon the face of the lease executed by Mrs. *Barker* to him, she shews herself to have no title. And the assent of the trustees, might apply with equal effect to the case of *Doe d. Barber v. Lawrence*.

BAYLEY, B.—If this had been a lease from these parties in their own names simply, without disclosing on the face of it the rights which they individually possessed, the demise by *Sarah Barker*, as surviving lessor, might have been sustained; because the lessee would, in that case, have been estopped from saying she was not his lessor. But the lease does disclose what the title of the lessor is, and describe *Roberts* as surviving executor of *W. Barker*. It discloses also the bequest to *Sarah Barker* as his widow, with reference to this property, and describes it as leasehold for the residue of a term. *Roberts* therefore was the surviving executor, in whom alone was vested the legal interest; and it was his lease only in law, though in terms the lease of *Sarah Barker*, for it operates only as a confirmation by her.

The devise is to the executors, on trust to permit the lessor of the plaintiff to receive the rents of this leasehold for her life or widowhood, and its effect at law was to vest the legal estate in *Roberts* and *Shirven*, and in the personal representative of the survivor of them, and to give Mrs. *Barker* an equitable right only during her life or

widowhood. It would be contrary to the trust given to the executors, that they, or either of them, should convey to her the legal estate. An assignment is a species of conveyance which is not to be presumed, and is not within the contemplation of the parties. This lease operates at common law; for, the statute of uses applies to freeholds only and does not comprehend copyholds and leaseholds. Then, as, under the statute of uses, by a devise of freehold to *A.* for the use of *B.*, *B.* takes the legal estate, and *A.* is the conduit pipe merely; so, at common law, if a leasehold is bequeathed to *A.* to the use of *B.* the legal interest is in *A.* and not in *B.* Therefore, in this case, it appears on the face of the lease in question that the legal estate was in *J. Roberts*, and in him only, so that, on his death, it devolved to his personal representative, he having survived the other trustee.

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1832.

DOE  
d.  
BARKER  
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GOLDSMITH.

There may be purposes for which a testator might wish the legal interest to remain in the trustees in order to control *Sarah Barker's* occupation, though he might intend her to have the beneficial interest; but here there is no evidence of his intention to give *Sarah Barker* a life estate. Then, if so, the lease operates as a lease by *Roberts* and a confirmation by the others. That a stranger to the legal interest, whose real title is disclosed on the lease cannot re-enter under a power to that effect, is clear in the case of *Doe v. Lawrence*. The ejectment will not lie; and the rule for a nonsuit must be made absolute.

BOLLAND, B., and GURNEY, B., concurred.

Rule absolute.

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1832.

## JAMES v. CHILD.

An attorney, having transacted common law, as well as conveyancing and other business, not taxable, delivered a bill for all the common law business, which his client examined and admitted to be correct, and, on application for payment, directed the attorney to borrow for him a sum of money, which was accordingly done, and credit given to him in account for that amount; subsequently, on failing to obtain payment of any part of his charges for conveyancing, the attorney brought an action for the residue of his demand:—*Held*, that he had no right to separate the common law and conveyancing bills, and to appropriate the sum credited in discharge of the former; and, therefore, that he could not sustain an action, without delivering a signed bill, pursuant to the statute.

*Semble*, that the drawing and engrossing a warrant of attorney is a taxable item.

**T**HE plaintiff, an attorney, was employed by the defendant from the year 1822 until about *April*, 1825, in conveyancing business; before the year 1828, in prosecuting and defending actions at law; and, in 1828, in preparing conveyances. In *September*, 1828, the plaintiff made out and delivered to the defendant a separate bill for the law charges, amounting to 100*l.* 3*s.* 1*d.*, with a statement that some few charges were to be added for agency. The defendant examined and admitted the bill, and requested the plaintiff to raise for him 100*l.* on his bond, which was done in *November* following; and the amount, with 1*l.* 9*s.* 6*d.* before received, placed by the plaintiff to the defendant's credit. At this time, the bill for conveyancing had not been delivered, and the plaintiff had been referred to a third party for payment of a part of it, which third party the plaintiff had ineffectually sued at the defendant's instance. Subsequently, the plaintiff brought his action to recover 52*l.* 10*s.*, as appeared by the particulars, for conveyancing. The whole debt was 164*l.* 14*s.* 6*d.*, including 5*l.* 11*s.* for raising the 100*l.*, and 6*l.* 10*s.* the agent's charges, for preparing and engrossing a warrant of attorney, not included in the bill delivered. After the action was commenced, the plaintiff, by his particulars of demand, abated the 5*l.* 11*s.* included in the first account, in order to apply that sum to the sum of 6*l.* 10*s.* then due in respect of taxable items. No signed bill had been delivered pursuant to the statute.

These appearing to be the facts at the trial before *Bolland*, B., at the last *Pembroke* Assizes, the plaintiff was nonsuited, because the warrant of attorney was said to be a taxable item—*Sandom v. Bourn* (a); *Wild v. Craw-*

(a) 4 Campb. 68.

*ford*(a); *Ex parte Prickett* (b); and, because the plaintiff could not separate the conveyancing from the common law charges, and should have delivered a bill embracing the whole—*Hill v. Humphreys* (c), *Thwaites v. Mackerson* (d), *Benton v. Garcia* (e), *Watt v. Collins* (f).

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v.  
CHILD.

In moving for a rule to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff, or a new trial had, *John Evans* urged the plaintiff's right to appropriate the payment to the common law bill; and said that the case of *Sandom v. Bourn*, relied upon by the defendant as an authority to shew that preparing a warrant of attorney constituted a taxable item, had been questioned by *Bayley, J.*, in *Burton v. Chatterton* (g), and by *Alderson, J.*, in *Smith v. Taylor* (h). He also insisted that the plaintiff might recover for the conveyancing, though the defendant owed him money for the common law business, which, no signed bill having been delivered, could not be recovered—*Mowbray v. Fleming* (i), *Heming v. Wilton* (k).

*Chilton* shewed cause.—Lord *Ellenborough*, in *Sandom v. Brown*, and Lord *Tenterden*, in *Wild v. Crawford*, were of opinion that the preparing a warrant of attorney was a taxable item, and, acting upon that opinion, nonsuited the plaintiffs in each of these cases. The rule as laid down by *Alderson, J.*, in *Smith v. Taylor*, viz. that business in order to be taxable must be done in Court, seems to be too limited. The cases do not support it. Thus, business done at the Quarter Sessions, *Clark v. Donovan* (l), and in the

(a) 2 Stark. N. P. 538.

(b) 1 N. R. 266.

(c) 2 B. & P. 343.

(d) M. & M. 199.

(e) 5 Esp. 149; 11 East, 287, n.

(f) R. & M. 284.

(g) 3 B. & Ald. 437.

(h) 5 Moore & P. 66; S. C. 7

Bingh. 264.

(i) 11 East, 285.

(k) M. & M. 199.

(l) 5 T. R. 694. And see the same point determined by the Court of Common Pleas in *Sylvester v. Webster*, 2 Moore & Scott, 506.

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insolvent court, *Smith v. Wattleworth* (a), have been held to form taxable items. *Winter v. Payne* (b). [Bayley, B.—These cases are within the statute, the charges being for business “at law.”] At all events, the plaintiff could not split his demand, and by an appropriation work an injustice to the defendant, who otherwise might have had the whole bill taxed; for, the whole business, with the exception of one item, was done before the money was paid on account.

*John Evans and Whitcombe, contra.*—Upon the examination and approval of the plaintiff’s demand for common law business by the defendant, and the payment and appropriation of 100*l.* to that account, that debt ceased to exist. And, at all events, it was a question of fact for the jury to say whether the payment was intended to be applied to the bill thus settled and approved. At that time, the entire bill could not be made out. It was doubtful whether the defendant was liable for the conveyancing business, and the plaintiff was referred by the defendant to other persons for payment. No injury is worked to the defendant; for, the common law charges may still be taxed though paid.

BAYLEY, B.—I am of opinion that the nonsuit was right. In general, if an attorney does business of different descriptions, part taxable, and part not, the whole becomes one entire demand, and, as such, subject to taxation. For, such demands cannot be split, so as, by making them out separately, to avoid taxation of the whole in respect of particular items liable by law to taxation. If a party, with a full knowledge of all the circumstances, by a distinct agreement, suffer a bill due from him to an attorney for common law charges to be made up separately from one for conveyancing, and agree to pay the common law bill, and not to have the conveyancing bill taxed, that agreement may prevail; but there are no facts here to warrant the conclu-

(a) 6 D. & R. 510; S. C. 4 B. & C. 364.

(b) 6 T. R. 694.

sion that any such agreement took place in the present case. On the contrary, charges for proceedings at law have existed in this case. And when the payment of 100*l.* was made, the defendant had a right to consider the residue which was not paid as standing in the same situation with that which had been so previously discharged. The original amount of the common law bill examined by the defendant was 100*l.* 3*s.* 1*d.*; but it is imperfect on the face of it; for it states at the end that some further items are to be introduced when the plaintiff could get his agent's charges. Those charges do not appear ever to have been introduced; 1*l.* and a fraction had been paid, and 100*l.* was afterwards credited as paid. Now, if it was paid without specific appropriation by the defendant at the time (and of such appropriation I see no evidence), I am of opinion that the residue would be taxable, and that the payments made should be applied to so much as on taxation would appear to be due. A small sum for taxable items still remains due, notwithstanding the appropriation; but these charges are abated by the plaintiff, as it seems, for the purpose of evading the salutary provisions of the statute.

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BOLLAND, B.—I have never altered my opinion, that the nonsuit in this case was right. There is no evidence to support the argument that the sums paid were appropriated to the payment of the common law bill, or that the plaintiff's whole demand on that account was intended to be satisfied by that payment. It was a payment made under pressure by the plaintiff, for an account allowed to be imperfect; for it states the agency charges to be not yet procured; and they, as well as the taxable items amounting to 6*l.* 10*s.*, remain yet unpaid.

GURNEY, B.—The plaintiff brings this action for his bill, which is said not to be subject to taxation; but as, at the time of the settlement between the parties, 6*l.* 10*s.* re-

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mained due from the defendant to the plaintiff for taxable items, and it does not appear that any abatement of the 5*l.* 11*s.* for untaxable items was really made by the plaintiff until a late period; taxable items remained in this account at the time of bringing the action.

Rule discharged.

DOE *d.* MEYRICK *v.* ROE.

Where a tenant, without giving notice to his landlord, suffered judgment by default in ejectment, the court let in the landlord to defend, upon payment of costs.

A RULE having been obtained to shew cause why the judgment signed against the casual ejector should not be set aside, and the landlady of the premises let in to defend, on an affidavit imputing collusion to the tenant and the lessor of the plaintiff, and stating that the landlady had no notice of the service of the declaration from the tenant, or of the action, before judgment was signed—

*J. Jervis*, on shewing cause, produced an affidavit denying the collusion; and contended that the Court would not admit the landlady to defend the action, but that her remedy was by ejectment, or by action against the tenant. He cited *Doe dem. Ledger v. Roe* (a); and, to shew that the Court would not interfere except in a clear case of collusion, *Goodtitle v. Badtitle* (b).

*Bere, contrà*, distinguished the case from *Goodtitle v. Badtitle*, by the fact stated in the affidavit, that the landlady had received rent from the tenant, which did not appear from the report of that case. He was stopped by—

BAYLEY, B.—It seems to me that the party may be let in to defend, on paying the costs; and that the judgment

(a) 3 Taunt. 506.

(b) 4 Taunt. 820.

and execution ought to be set aside, the defendant undertaking to take short notice of trial.

Rule absolute.

*Each. of Pleas,*  
1832.

Don  
d.  
MEYRICK  
v.  
ROE.

WILSON v. GRIFFIN.

**S**PECIAL bail were put in in due time, and the defendant rendered without giving notice of bail to the plaintiff's attorney. An attachment was afterwards obtained against the sheriff, for not bringing in the body; and

Where bail are put in to render, no notice of their having been put in is necessary.

*Platt* obtained a rule to set aside the attachment with costs; against which

*Butt* shewed cause, and relied upon the rule stated in *Tidd*, 253, 9th edit., that special bail shall not be considered as put in, until notice be given of such bail being put in to the plaintiff's attorney: but—

*Per* BAYLEY, B.—That is a rule of the *Common Pleas*. The bail here were merely put in for the purpose of rendering the defendant; and, as there cannot be any object in giving the notice, it would not be consistent with common sense to hold such notice to be necessary.

Rule absolute.

CLARK v. ADAMS.

**T**HE defendant being under terms to plead issuably and rejoin gratis, pleaded; and the plaintiff, having replied to the country, demanded a rejoinder, and, after waiting

A defendant, under terms to rejoin gratis, must rejoin within twenty-four hours.

*Exch. of Pleas,* 1832. twenty-four hours for the defendant to rejoin, signed judgment; upon which

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*Kelly* obtained a rule to set aside the judgment for irregularity, and produced an affidavit of merits.

*Platt* was to shew cause; but the Court stopped him, and called upon

*Kelly* to support his rule.—The practice in this point is unsettled; and there is no authority which decides that rejoining gratis means rejoining within twenty-four hours. It is true, that, being under terms to rejoin gratis, dispenses with the four-day rule to rejoin; but the defendant is not entitled to his four days by reason of the rule, but by the practice of the Court: the term gratis imports no more than that the plaintiff shall not be put to the expense of the rule; but does not operate as an abridgment of time.

LORD LYNTHURST, C. B.—In ordinary practice, a rule to rejoin is a four-day rule, and the expense of the rule is very trifling. Where a party is bound to do an act on demand, he is bound to do it within twenty-four hours. The effect of these terms is to dispense with the four-day rule to rejoin, and of necessity to dispense with the time allowed for rejoining, as the four days are to be calculated from the service of the rule. Where no rule is served, there is no mode by which the time can be measured, without laying down some new rule of computation.

BAYLEY, B.—My impression, as collected from the practice in the *King's Bench* and *Common Pleas*, always has been, that a defendant under terms to rejoin gratis, must rejoin within twenty-four hours. The general rule is, that, when a party stands upon a demand, he is bound to do the

act within twenty-four hours after the demand, which rule is applicable, as well to the demand of a rejoinder as of a plea. The Master certifies that such is also the practice of this Court.

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v.  
ADAMS.

Rule absolute on the merits, on payment of costs, and special terms.

END OF TRINITY TERM.

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REGULA GENERALIS.



COURT OF EXCHEQUER CHAMBER.

*Michaelmas Term, 2 Will. 4.*

**IT** IS ORDERED, That henceforth the costs of proceedings upon writs of error from the Court of *Exchequer* to this Court be taxed and allowed by the Master of the Court of *Exchequer*.

TENTERDEN,  
N. C. TINDAL,  
S. GASELEE,  
J. PARKE,

J. B. BOSANQUET,  
W. E. TAUNTON,  
E. H. ALDERSON,  
J. PATTESON.

## MEMORANDUM.

**U**PON the resignation of *John Williams*, Esq., K.C., and *C. C. Pepys*, Esq., K.C., Mr. Serjeant *Taddy*, K.S., and Mr. Serjeant *Merewether*, P.P., were appointed Attorney and Solicitor-General to Her Majesty, the Queen.

AN

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TO THE

## PRINCIPAL MATTERS.

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### ABATEMENT.

#### *Pleas in.*

If an affidavit (verifying a plea in abatement which refers to the declaration) is sworn before the declaration is delivered, the plaintiff may treat the plea as a nullity, and sign judgment. *Johnson v. Popplewell*, 544

### ACCORD AND SATISFACTION.

Arbitrament without performance is no answer to an action for a debt, where the amount only of such debt is referred, and the award merely ascertains the amount, and directs that it shall be paid in money. *Allen v. Milner*, 47

### ACTION.

#### I. *When maintainable.*

See **BILLS & NOTES.**

**BOND.**

**FORMER RECOVERY.**

**NEWSPAPER.**

**WATERCOURSE.**

#### II. *Parties to.*

Where *A.* applied to *B.*, a member of a banking establishment, for a loan of money, which *B.* advanced out of the funds in which he and his partners were jointly interested:—

### AFFIDAVIT.

*Held*, that the firm might sue *A.* for money lent. *Alexander and others v. Barker*, 133

### AFFIDAVIT.

#### I. *To hold to Bail.*

##### (1) *By whom made.*

It is sufficient, in an affidavit to hold to bail, that the deponent describes himself as clerk to *A. B.* and *C. D.*, attorneys of (the place of business of the attorneys). *Alexander v. Milton*, 424

##### (2) *Cause of Action.*

1. An affidavit to hold to bail for money paid, &c. must allege that the money was paid, &c., *at the request of the defendant.* *Reeves v. Hucker*, 44

2. It is not necessary, in an affidavit to hold to bail on a bill of exchange, to express the sum for which the bill was drawn. *Hanley v. Morgan*, 331

3. An affidavit to hold to bail on a bill of exchange, which states that the defendant is indebted in a sum specified, is sufficient, without stating the amount of the bill. *Lewis v. Gompertz*, 352

4. An affidavit to hold to bail for a sum due to plaintiff as indorsee of a bill of exchange, must state by whom the bill is indorsed; stating that it was *duly* indorsed to the plaintiff is insufficient. *Ibid.*

5. An affidavit to hold to bail for money due by maker to payee of a promissory note must state when the note is payable, or that it is overdue. *Kirk v. Almond*, 354

6. Where an affidavit to hold to bail on three promissory notes was defective as to two of them, the Court discharged the defendant on filing common bail, and would not order bail to be taken to the amount of the note as to which the affidavit was sufficient. *Ibid.*

7. An affidavit to hold to bail stated that the defendant was justly and truly indebted to the plaintiff in 25*l.*, by virtue of an agreement, whereby the plaintiff agreed to procure a lease to be granted to the defendant, and the defendant agreed to pay the plaintiff, his solicitor or agent, 25*l.* in full, for his share or proportion of the costs and expenses of the agreement, and of the lease and counterpart, and of a proposal to be laid before a Master in *Chancery* for a grant of the lease; the lease and counterpart being to be prepared by the plaintiff's solicitor; and that the plaintiff did procure a lease to be granted, which was prepared by the plaintiff's solicitor; but did not state that the plaintiff had paid the solicitor, or had himself borne or incurred the expenses:—*Held*, insufficient. *Townsend v. Burns*, 468

### (3) Defects in.

1. It is too late to take an objection to the affidavit of debt after the time for putting in bail above has elapsed. *Tucker v. Colegate*, 489

2. An application to discharge a

defendant out of custody for a defect in the affidavit to hold to bail, comes too late after bail above have been put in. *Reeves v. Hucker*, 44

3. Affidavit to hold to bail—"A. B., clerk to L. J. J. N., maketh oath that the defendant was indebted to the said J. N.:" the *quo minus* was at the suit of L. J. J. N.:—*Held*, no variance. *Noel v. Williams*, 379

4. The Court will not order a bail bond to be delivered up to be cancelled, on the ground that the process is general, and the affidavit to hold to bail as executor. *Ilsey (Executor) v. Ilsey*, 330

## II. In particular Cases.

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DISTRINGAS.

EJECTMENT.

Affidavits to ground a motion to stay proceedings upon a bail bond may be intitled either in the original action or in the action against the bail. *Lyles v. Chetwood*, 332

## III. When filed.

The practice on the revenue side, requiring a defendant to file his affidavit against a rule one day before the rule comes on, is not strictly enforced. *Quære*, if such practice applies to a motion to enlarge a rule. *Attorney-General v. Jeyes*, 352

## AGENT AND PRINCIPAL.

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## AGREEMENT.

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## ANNUITY.

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## ARREST.

### APPOINTMENT.

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### ARBITRATION.

#### I. *Submission.*

Where four actions, three in the *Exchequer*, and one in the *King's Bench*, were referred by an agreement of reference, which had been made a rule of the *King's Bench*, under a clause therein, empowering the parties to make it a rule of the *King's Bench* or *Exchequer*, the Court refused to allow the agreement to be made a rule of this Court. *Semble*, that the statute 9 & 10 *Will.* 3, c. 15, only authorizes the making an agreement to refer a rule of one Court, and not of more than one. *Winpenny v. Bates*, 379

#### II. *Effect of.*

Arbitrament without performance is no answer to an action for a *debt*, where the amount only of such debt is referred, and the award merely ascertains the amount, and directs that it shall be paid in money. *Allen v. Milner*, 47

## ARREST.

#### I. *For what cause.*

If *A.* grant an annuity, and *B.* indemnify him by bond, *A.* may arrest *B.* for the amount of the arrears which *A.* may have been compelled to pay. *Anderson v. Bell*, 630

#### II. *Without cause.*

A defendant was arrested for 37*l.*, the amount of goods sold and delivered. The defence was, that the goods were of bad quality and had been returned to the plaintiff, who sent them back. The plaintiff recovered 15*l.* only; and, upon an

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## ATTORNEY.

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affidavit, uncontradicted, that the defendant had objected to the quality of the goods, and the plaintiff had agreed to take them back:—*Held*, that the defendant was entitled to costs under the statute 43 *Geo.* 3, c. 46, s. 3, the arrest being without reasonable or probable cause. *Linley v. Bates*, 659

## ASSIGNEE.

See BANKRUPT.  
INSOLVENT.

## ATTACHMENT.

On the 21st Nov. the plaintiff ruled the Sheriff to return the writ; the Sheriff made his return as of Michaelmas Term, and on the 30th Nov., after the Sheriff had returned the writ, the plaintiff took out a rule for the Sheriff to bring in the body, which was dated as of the last Michaelmas Term, and served on the 3rd of December. The Court granted an attachment against the Sheriff for not bringing in the body. *Heywood v. Jackson*, 208

## ATTORNEY.

#### I. *Privileges of.*

1. A solicitor of the Court of *Chancery*, not admitted in the *Equity Exchequer*, may practise in the *Equity Exchequer* in the name of a sworn clerk of the Remembrancer's Office, and is entitled to his fees. *The Attorney-General on the relation of Crupper and Others v. Malin and Others*. 500

2. A clerk in Court is entitled to charge a term fee in a revenue prosecution, at the suit of the Attorney-General, where only a *subpoena ad respondendum* issues, without any in-

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formation or other proceeding being had. *The Attorney-General v. Munday*, 347

3. The term fee of a clerk in Court, in a revenue prosecution, is 3s. 4d., and he cannot charge 6s. 8d. *Ibid.*

## II. Liabilities of.

1. *A.*, a complainant in Chancery, employed *B.* as his solicitor, during whose employment an irregular order to dismiss the bill on a certain day, unless publication passed, was obtained; before that day arrived, *C.* was appointed the solicitor of *A.*, and the bill having been dismissed because no step was taken by *C.*, an action was commenced against him for negligence, which was held to be maintainable, because he should have conformed with the order, or should, within the time, have moved to vacate it. *Frankland v. Cole*, 590

2. An attorney, who has undertaken a cause, is not bound to proceed without adequate advances from time to time by his client, for expenses out of pocket; and, therefore, the Court will not compel an attorney, even after notice of trial, to carry the cause into Court, unless the client supply him with sufficient funds to pay the expenses out of pocket thereby incurred. *Wadsworth v. Marshall and Another*, 665

## III. Bill of Costs of.

1. The Court will refer an attorney's bill of costs to be taxed by the Master after it has been paid, on application within a reasonable time, without shewing circumstances of fraud or imposition. *Glascott v. Castle*, 355

2. In an action on an attorney's bill for business done in suing out and prosecuting a commission of lunacy, the Court discharged a rule to refer the bill to the Master for

taxation, observing that, if taxable, it would be better taxed in *Chancery*:—*Quære*, whether a bill for business done in lunacy is taxable. *Jones v. Byewater*, 371

3. *Semble*, that the drawing and engrossing a warrant of attorney, is a taxable item. *James v. Child*, 678

4. In an action on an attorney's bill, against two:—*Held*, that a Baron at Chambers might, in his discretion, on the application of a defendant, order the bill to be taxed, without such defendant giving the undertaking to pay the amount. *Watson v. Postan*, 370

5. An attorney having transacted common law, as well as conveyancing and other business not taxable, delivered a bill for all the common law business, which his client examined and admitted to be correct, and on application for payment, directed the attorney to borrow for him a sum of money, which was accordingly done, and credit given to him in account for that amount; subsequently, on failing to obtain payment of any part of his charges for conveyancing, the attorney brought an action for the residue of his demand:—*Held*, that he had no right to separate the common law and conveyancing bills, and to appropriate the sum credited in discharge of the former; and, therefore, that he could not sustain an action, without delivering a signed bill, pursuant to the statute. *James v. Child*, 678

## ATTORNMENT.

*See* EJECTMENT.

## AUCTION.

*See* EVIDENCE.

## AWARD.

*See* ARBITRATION.

## BAIL.

## BAIL.

### I. To the Sheriff.

#### (1) Affidavit to hold to Bail.

See AFFIDAVIT.

#### (2) Deposit of Money with Sheriff.

Where money was deposited in Court in lieu of putting in and perfecting bail above, pursuant to statute 7 & 8 Geo. 4, c. 71, and the plaintiff obtained a verdict:—*Held*, that he was not at liberty to issue execution for the whole sum recovered, but was bound to take the sum deposited out of Court, and to limit his execution to the surplus only. *Hews v. Pike*, 359

#### (3) Proceedings on Bail Bond.

In an application by bail, to stay proceedings on a bail-bond, collusion with the defendant must be denied by both the bail. *Dowson v. Cull*, 671

## II. Bail Above.

### (1) Notice of Bail.

1. Where bail are put in to render, no notice of their having been put in is necessary. *Wilson v. Griffin*, 683

2. The rule T., 1 W. 4, which enables a defendant to put in and justify bail at the same time, upon giving four days' notice, is an enabling and not a disabling rule; and therefore, a prisoner, who before the rule might put in and justify bail upon a two days' notice, may still do so. *Davies v. Grey*, 309

3. A notice that bail will be put in, and justify at the same time, must be a four days' notice, exclusive of Sunday, and must be served before eleven o'clock, A. M. *Jenkins v. Maltby*, 124

4. It is not necessary to give four days' notice of bail who are added

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by a Judge's order. *Perry's Bail*, 475

5. It is not necessary to state in the notice of bail, that the bail have resided for the last six months at the places of residence described in the notice. *Fenton v. Warre*, 54

6. A notice of bail did not state the numbers of the houses where the bail resided, upon which ground, the bail having been found and being sufficient, the plaintiff had the costs of his appearance to oppose. *Innis v. Smith*, 634

### (2) Changing Bail.

Where the agent for the defendant had not time to communicate with his principal in the country, so as to obtain the names of good bail, the Court allowed the bail to be changed, upon payment of costs, and putting the plaintiff in the same situation as if good bail had been put in in the first instance. *Whitehead v. Minn*, 54

### (3) Justification of Bail.

It is insufficient, in an affidavit of justification, to state that the bail are possessed of the requisite property. *Hutchinson's Bail*, 487

### (4) Render of Principal.

1. Where a defendant is in custody under a warrant of commissioners of bankrupt, the Court will enlarge the time for rendering the defendant, though the bail have not justified. *Gibson v. White*, 85

2. A defendant having been arrested in the country, and bailed, was declared a bankrupt, and allowed until after the time for rendering him to pass his final examination; the Court enlarged the time to render until four days after the final examination of the bankrupt, but required an affidavit that it would be incon-

venient for the commissioners to attend at the county gaol or in *London*, to take the bankrupt's final examination. *Harris v. Alcock*, 486

(5) *Proceedings against by Scire Facias.*

The Court will not give leave to sign judgment in a *scire facias* against bail on a summons of one in *Middlesex*, unless the other resident out of *Middlesex* is warned of the proceeding. *Newton v. Maxwell*, 635

BAILMENT.

See STOPPAGE IN TRANSITU.

BANKER.

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BANK OF ENGLAND.

See TENDER.

BANKRUPT.

See SHERIFF.

I. *Assignee.*

(1) *Liability of.*

A coachmaker, who was tenant from year to year of certain premises, and had several coaches on hire, became bankrupt, and his assignees entered upon the premises to keep the coaches in repair in pursuance of the bankrupt's contracts; in *August*, the bankrupt's effects were sold and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the *Michaelmas* following. In an action by the landlord for a quarter's rent due the *Christmas* following:—*Held*, that the assignees were liable. *Ansell v. Robson*, 610

(2) *Actions by and against.*

The depositions are conclusive evidence under the 92d section of

6 *Geo.* 4, c. 16, in a case where the bankrupt might have sued, if no bankruptcy had ensued, though the conversion which gave the right of action took place after the act of bankruptcy. *Fox v. Mahony*, 325

BARON AND FEME.

See HUSBAND AND WIFE.

BENEFICE.

See ECCLESIASTICAL LAW.

BILLS AND NOTES.

(1) *Presentment of.*

Where a bill of exchange, drawn with the words "pay to my order in *London*," in the body of the bill, and directed to the drawees "payable in *London*," was accepted at Messrs. *J., L., & Co.*, bankers, *London*:—*Held*, that a presentment at *J., L., & Co.'s*, was necessary to charge the drawer; and that the circumstance of the drawee having negotiated it after such acceptance, made no difference. *Gibb v. Mather and Others*, 254

(2) *Actions on.*

After a bill of exchange became due, and whilst it was in *London*, where it had been sent for presentment for payment, the person who indorsed it to the plaintiff came to him with another bill for the same amount, and prevailed on him to take it for and on account of and in renewal of the first bill. Before the second bill became due, and without delivering it back, the plaintiff brought an action on the first bill against the acceptor:—*Held*, that he could not recover even the expenses of noting and postages. *Kendrick v. Lomax*, 405

## CHARITABLE USES.

### BISHOP.

See ECCLESIASTICAL LAW.

### BOND.

*When Discharged.*

Debt, on a common money bond, by executor of obligee against executor of obligor. Plea—that the money mentioned in the condition was part of the personal estate of *A. B.*, deceased, by whom it had been bequeathed to the testator of the plaintiff and the testator of the defendant, and the survivor of them, and the executors and administrators of such survivor, upon trust to put and place the same out at interest, upon such real or other sufficient security as they might approve of, and to pay the interest, &c., &c.; that the testator of the plaintiff died, leaving the testator of the defendant surviving; whereupon the said personal estate of *A. B.* vested in the defendant's testator, to be by him and his executors and administrators applied according to the trusts of the will of *A. B.*:—*Held*, on general demurrer, that the plea was bad. *Gleadow and Others, Executors of Gleadow, v. Atkin and Another, Executors of Atkin*, 548

### BRIBERY.

See PARLIAMENT.

### CANAL.

See NUISANCE.

## CHARITABLE USES.

A trust to apply certain funds "towards the repairs of the church of *W.*; the payment of the 15th, and the relief of the poor; buying of armour; and setting forth soldiers, and repairing *Sambridge-bridge*, within the parish of *W.*," is of a public nature, and

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therefore, an act done by the majority of the Trustees assembled for that purpose, is valid. *Wilkinson v. Malin*, 636

Building a school-house, and educating poor children, is within the meaning of a trust for the "Relief of the Poor." *Ibid.*

### CHURCH.

See ECCLESIASTICAL LAW.

### COGNOVIT.

See PRACTICE.

### COMMITMENT.

*Of Prisoners.*

Where a defendant is in a county gaol, the plaintiff is not entitled as of right to a writ of *habeas corpus ad satisfaciendum*, with a view to remove him to the custody of the Warden of the *Fleet*. The issuing of such a writ is discretionary with the Court. *Williams v. Jones*, 611

## CONTRACT.

Plaintiff, who was the grandson of the deceased tenant of a farm, remained in possession after his grandfather's death. A bargain was made between plaintiff and *M.*, an incoming tenant, who had agreed to take the farm from the landlord, by which bargain *M.* was to give the plaintiff 30*l.* for the crops, manure, &c., to be secured by the promissory note of *M.*, and a surety, which note was to be held by *D.*, and was to be by *D.* attested and handed over to plaintiff, if plaintiff delivered up the possession of the *lands* on the next morning, but he was to remain in possession of the house for a few weeks, at a rent of 1*s.* a-week, to be paid to *M.* The note was accordingly drawn with a

clause of attestation, and was signed by *M.* and his surety, and handed to *D.* The next morning, upon *M.* and *D.* requesting plaintiff to give up the possession, he refused to give up the *place*; but there was evidence that, on that day, *M.*'s cattle were on the lands, and that plaintiff's were not. Plaintiff kept possession of the house for three weeks, when he was turned out by a constable. The note was never attested, and it was not proved how the plaintiff got it into his possession:—*Held*, in an action by the plaintiff against the makers of the note, that a jury were warranted in saying that the bargain had been complied with on the part of the plaintiff. *Evans v. Morgan*, 453

## COSTS.

I. *Security for.*

1. Security for costs may be applied for, after an order for time to plead. *Wilson v. Minchin*, 87

2. The Court will not order security for costs, on the ground of one of the plaintiffs being resident abroad, where another of the plaintiffs is resident in this country. *Anonymous*, 88

3. Where the plaintiff is out of the jurisdiction of the Court, a motion for security of costs may be made without a previous application to the plaintiff's attorney; but, without such an application, the rule *nisi* will not be a stay of proceedings. *Jones v. Jones*, 207

4. A defendant, who moves for security for costs, need not state the stage of the proceedings; it rests with the plaintiff to show that the application is too late. *Ibid.*

II. *When, and how restricted.*

See COURT OF REQUESTS.

III. *Of the Day.*

1. Costs of the day for not proceeding to trial, may be obtained as a separate part of the order for discharging a rule for judgment as in case of a nonsuit, but not as a condition for discharging that rule. *Leniker v. Barr*, 473

2. A term's notice is not necessary before motion for costs of the day. *French v. Burton*, 634

IV. *On Summons.*

A Judge at Chambers has no power to give costs on summons. *Spicer v. Todd*, 165

V. *After Trial.*

*Semble*, where costs are ordered to abide the event, neither party has the costs of the first trial, unless the verdicts are both for the same party. *Canham v. Fish*, 126

VI. *Taxation of.*

See ATTORNEY.

1. Reasonable costs of serving a notice of taxation will be allowed; and if the defendant reside in the country, and has not employed an attorney, an attorney may be employed in the country to serve him with a notice of taxing costs. *Thorp v. Warby*, 488

2. The rule *H. T. 2 Will. 4, s. 74*, is prospective, and applies to all taxations after the commencement of *Easter Term*. *Cox v. Thomason*, 498

3. Where the general issue is pleaded to a declaration containing several counts, it tenders a distinct issue upon each count; and, upon taxation, the defendant, under the *R. H. 2 Will. 4, s. 74*, is entitled to the costs of those counts found for him. *Ibid.*

## COURT OF REQUESTS.

1. A defendant residing in *Bath*, against whom a verdict for less than 10*l.* has been recovered, is entitled to enter a suggestion on the roll, to deprive the plaintiff of costs, under the 45 *Geo.* 3, c. 47, although the plaintiff resides in *London*, and the cause of action has not arisen within the jurisdiction of the *Bath* Court of Requests, established by that act. *Graham v. Browne*, 327

2. The verdict of the jury is, in general, the criterion of the amount due from the defendant to the plaintiff, by which the Court is to be regulated in entering a suggestion to give the defendant costs. *Drew v. Coles*, 505

3. The *Bradford* Court of Requests Act gives jurisdiction to that Court, where the debt *demanded* does not exceed 5*l.*, which means a *rightful* demand; and if the plaintiff sue elsewhere, and recover less than 5*l.*, the defendant will be entitled to costs. *Ibid.*

## CURATE.

See ECCLESIASTICAL LAW.

## DAMAGES.

See DOWER.

## DEED.

## I. Construction and Operation of.

See EJECTMENT.

1. *W. M.*, tenant in tail of the *Cefn Coch* property, which consisted of a mansion-house and thirteen closes, formerly in one occupation, a corn-mill called *Melin Cefn Coch*, and a fulling-mill called *Pandi' Cefn Coch*, with the lands thereunto belonging, in 1816 suffered a recovery, and in the recovery deed declared his intention to convey the property thereafter particularly mentioned,

and settled "All those the capital mansion-house, messuage, or tenement, with the several out-offices, gardens, plantations, and hereditaments thereunto belonging, commonly called or known by the name of *Cefn Coch*; and also those fields, closes, pieces or parcels of land or ground and hereditaments (eight in number), commonly called or known by the several names, &c. (naming them), being *parts and parcels of the demesne lands* of *Cefn Coch*, in the holding or occupation of *T. M.*, together with all and singular houses, out-houses, edifices, buildings, &c., lands, meadows, &c., hereditaments and appurtenances whatsoever, to the said capital messuages, tenements, lands, hereditaments, and premises belonging, or in anywise appertaining, or therewith or with any part or parcel thereof usually set, let, held, occupied, or enjoyed, or accepted, reputed, taken, or known for, as part, parcel, or member thereof, or appurtenant thereto, or to any part or parcel thereof." Upon the death of *W. M.*, *T. M.* entered into possession of the property not conveyed by *W. M.*, and suffered a recovery of, and settled, the mills and lands thereunto belonging by the following description:—"All that corn-mill, with the appurtenants called *Melin Cefn Coch*, and the lands thereunto belonging, and then better known by the name of *Tyddyn y felin Cefn Coch*, and all that fulling-mill called *Pandi' Cefn Coch*; and all those five fields, closes, pieces, or parcels of land, part of *Tyddyn y felin Cefn Coch*, containing by estimation thirty-four acres, or thereabouts, and all houses, &c., and all lands, &c., in which *T. M.* had any estate, and the reversion and reversions, &c., and all the estate, &c., of *T. M.*" The five fields, part of the *Cefn Coch* property not named in the recovery

deed of 1816, consisted of about thirty-four acres:—*Held*, that the previous particular enumeration in the deed of 1816 confined the operation of the subsequent general words, and that the mansion house and eight fields only passed by that deed:—*Held*, also, that the five fields, formerly parcel of *Cefn Coch*, and not named in the recovery deed of 1816, passed by the recovery deed of 1824 by the description of "All those five fields, &c." *Doe d. Meyrick v. Meyrick*, 223

2. *James I.* granted to *R. T.* and his heirs the King's manor and town of *Aulton*, and the King's hundred of *Aulton*, with its rights, and all other things to the said manor and hundred belonging; and also, that they should have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and on all other lands and woods being in the same hundred, &c., although the same demesne and other lands were within the King's forest, &c.:—*Held*, that this grant did not confer a right of free warren over the King's lands within the hundred, but that the term "demesne lands" applied to lands held by *R. T.* as lord of the manor of *Aulton*; and that "other lands" applied to tenemental lands held by *R. T.* in fee of the King, or of any other lord, within the limits of the grant. *The Attorney-General v. Parsons*, 279

3. The term "demesne lands" properly signifies lands of a manor which the lord either has or potentially may have in *propriis manibus*. *Ibid.*

4. Where the words of a second deed are sufficient to pass the whole of the property conveyed by a former deed, and the intention to do so is clear; a mistake in describing the

occupation will not vitiate. *Wilkinson v. Malin and Others*, 636

## II. *Fraudulent and Void.*

An administratrix, being indebted to an attorney for rent, executed to him a mortgage of leasehold property belonging to her intestate, which falsely recited that 300*l.* was paid as a consideration; the next of kin, not knowing the facts, were induced, by misrepresentation, to execute the mortgage; and the jury at the trial found that the deed had not been fairly obtained:—*Held*, that the mortgagee was not entitled to recover in ejectment against the next of kin, because of the fraud, nor against the administratrix, who was the widow of the intestate, because the accounts of the estate had not been wound up. *Doe d. Woodhead v. Fallows and Others*, 481

## III. *Inspection and Production of.*

1. Where one part of a document has been lost, the Court will compel the party holding the other part, or his attorney if he holds it, to produce it at the Stamp Office, for the purpose of having it stamped, though it is not held on any trust for the party applying. *Neale v. Swind*, 278

2. If two parts of an agreement be interchangeably executed between landlord and tenant, in an action upon the agreement by a purchaser of the premises, the Court will not compel the tenant to produce his part to be stamped, unless such purchaser has applied to the vendor, or used every endeavour, without success, to find him. *Travis v. Collins*, 625

## DESCENT.

*See* HEIR.

**DISTRESS.**

1. *T.*, seized for life, granted an annuity to *W.*, and, to secure the annuity, in consideration of money, "granted, bargained, sold, and demised" to *F.* certain premises for a term of years, upon trust, in case the annuity should be in arrear, to raise the annuity by distress, or by sale or mortgage of the premises: afterwards, *T.* granted another annuity to *H.*, with a power of distress upon the same premises. *H.* distrained, and avowed the taking for arrears of the annuity under his deed: the tenant set up the demise to *F.*, but did not shew under whom he, the tenant, was in possession, or that *F.* had entered upon the premises, or had elected to treat the demise as operating by the statute of uses:—*Held*, that the demise to *F.* operated as at common law, and, without an entry, was no bar to the distress by *H.* *Miller v. Green*, 142

2. *T.* granted an annuity, charged upon certain premises, with a power, in case the annuity should be in arrear, to enter upon the premises and distrain for the annuity, "and the distress then and there to detain, manage, sell, and dispose of, in the same manner and in all respects as distresses for rents reserved upon leases for years might be detained, managed, sold, and disposed of, and as if the annuity were a rent reserved upon a lease:—"—*Held*, that growing crops could not be distrained under this power. *Ibid.*

3. In case for selling goods distrained for rent without an appraisal, the measure of damages is the value of the goods minus the rent. *Biggins v. Goode*, 364

**DISTRINGAS.**

**I. At Common Law.**

1. Where a *venire* against *A.*, who

was abroad, to recover for goods supplied to the wife of *A.* in her separate business, was served at the dwelling-house of the wife, and, upon a *distringas* issued *de cursu*, a levy was made upon the goods at the dwelling-house of the wife, the Court set aside the service of the *venire* and the *distringas*, with costs. *Hitchcock v. Badham*, 129

2. Since the statute 7 & 8 Geo. 4, c. 71, the Court will not increase issues upon a *distringas* at common law, but, if the common law course still remains, will leave the plaintiff to act upon it as he thinks fit. *Watson v. Locke*, 203

3. Where a plaintiff, without an order of the Court, sued out a *distringas*, and a *venire* served at the dwelling-house of the defendant, the Court refused a rule for sale of the issues returned by the sheriff. *Farmer v. Stanfred*, 495

**II. By Statute.**

1. There must be three attempts to serve the *venire* before a *distringas* can be obtained. *Fisher v. Goodwin*, 94

2. Where, after four unsuccessful attempts to serve a *venire*, the defendant's son told the plaintiff's attorney that the defendant kept out of the way to avoid being arrested, in order that he might sell his property for the benefit of his creditors, the Court granted a *distringas*. *Bennington v. Owen*, 125

3. The affidavit for a *distringas* must state where the residence of the defendant is situated. *Bomser v. Austen*, 45

**DOCKETING JUDGMENT.**

*See PRACTICE.*

**DOMICILE.**

*See LEGACY DUTY.*

## DOWER.

To entitle a widow to damages in dower, it must be alleged and proved, that the husband died seised of an estate of inheritance. *Morgan Jones v. W. Jones, Gent., one, &c.* 601

## ECCLESIASTICAL LAW.

A bishop issued a requisition under 57 Geo. 3, c. 99, s. 50, requiring the vicar of *W.* to nominate a curate with a stipend, on the ground that it appeared to the bishop, of his own knowledge, that the ecclesiastical duties of the vicarage and parish church of *W.* were inadequately performed by reason of the vicar's negligence. The vicar appointed no curate, and did not appeal to the archbishop. The bishop, after three months, licensed the Rev. *A. B.*, clerk, as curate of *W.*, with a stipend. The vicar refused to allow *A. B.* to officiate; upon which the bishop issued a mandate or summons to shew cause why the vicar should not pay the stipend due, and ultimately proceeded to sequestration:—*Held*, that the requisition upon which the whole of the proceedings were founded was in the nature of a judgment, and void, as the party had had no opportunity of being heard. *Capel v. Child*, 558

2. Such a requisition ought to state particular instances of negligence, or show *how* the incumbent was negligent. *Ibid.*

3. *Per Vaughan and Bolland*, Barons, the 50th section of the 57 Geo. 3, c. 99, does not apply to the case of a benefice with only one church and no chapel. *Ibid.*

## EJECTMENT.

## I. Service of Declaration.

## (1) When.

The stat. 1 W. 4, c. 70, s. 36, by

## EJECTMENT.

which landlords may, where the right of entry accrues in or after *Hilary* or *Trinity* Terms, serve ejectments at any time within ten days after the right of entry accrues, applies only to issuable terms. *Doe v. Roe*, 123

## (2) On Whom.

1. An affidavit of service of a declaration in ejectment, upon "*A. B.* and *C. D.*, tenants in possession, as executors," is insufficient. *Doe v. Roe*, 45

2. A declaration and notice in ejectment having been nailed upon the door of the premises, the tenant's wife called upon the person who had attempted to serve the ejectment, and requested to know what she was to do with the paper; he explained it to her, and recommended her to go to the plaintiff's attorney; she replied, she would see her husband immediately, and recommend him to do so:—*Held*, that this was not a good service. *Doe d. Briggs v. Roe*, 202

3. An ejectment may be served upon the wife of the tenant in possession off the premises, provided she be living with her husband at the time. *Ibid.*

## II. Judgment against the Casual Ejector.

1. Where several tenants in possession are served with separate copies of an ejectment, one rule is sufficient against the casual ejector. *Doe v. Roe*, 670

2. Acceptance of a declaration in ejectment by an attorney of another Court, is not sufficient ground for a rule (either absolute or *nisi*) for judgment against the casual ejector. *Doe d. Walker v. Roe*, 381

## III. Appearance.

1. Where a tenant, without giving

notice to his landlord, suffered judgment by default in ejectment, the Court let the landlord in to defend, upon payment of costs. *Doe d. Meyrick v. Roe*, 682

2. Where an ejectment is served upon a person who swears that he is in possession of no part of the premises sought to be recovered, the Court will order his name to be struck out from the appearance and consent rule, upon his undertaking to permit execution to issue for any part of the premises of which he may be in possession. *Doe d. Snape v. Snape*, 214

IV. *In Particular Cases.*

(1) *By Landlord.*

1. *W. B.* bequeathed certain leasehold premises to trustees on trust, to permit and suffer his wife to receive the rents, &c. during her life. Afterwards the surviving trustee and the widow granted a lease of the premises, the rent to be paid to the widow, and the lessors to have a power of re-entry upon nonpayment of rent: the lease disclosed the title of the widow, who, after the death of the trustee, entered on the premises:—*Held*, that, being a stranger to the legal estate, the power of re-entry could not be reserved to her, and that the lease operated as a lease by the trustee, and a confirmation by the widow. *Doe d. Barker v. Goldsmith*, 674

2. Where, by a lease, mortgagee demised, and the executrix of mortgagor demised and confirmed, and a power of re-entry was reserved to them or either of them:—*Held*, that it operated as the demise of the mortgagee, and the confirmation of the mortgagor's representative; that the re-entry enured to revest the estate in the mortgagee; and that a count in ejectment, laying the demise jointly

in the two, was not sustainable. *Doe d. Barney v. Adams*, 232

3. In ejectment for a forfeiture, under a covenant to keep in tenantable repair, it is not necessary to show that the premises were not in repair on the day of the demise; but, if proved to be out of repair a short time previously, it is incumbent on the defendant to give evidence that they have been put into repair before the right to re-enter accrued. *Doe d. Hemmings v. Durnford*, 667

4. What is sufficient evidence of privity, to render a party in possession liable, as assignee of a lease, for a forfeiture in an action of ejectment. *Ibid.*

(2) *By Elegit Creditor.*

If, at the time of the judgment, the *elegit* debtor is entitled to the whole property sought to be recovered in ejectment by the *elegit* creditor, other parties, who, with the *elegit* debtor, are in possession when the ejectment is brought, must prove their title; and, if they do not, the *elegit* creditor is entitled to judgment against all. *Doe d. Evans v. Owen*, 71

ELECTION.

*See* PARLIAMENT.

ELEGIT.

*See* EJECTMENT, IV. 2.

ERROR.

*Writ of.*

(1) *How brought.*

1. A writ of error founded upon the stat. 27 *Eliz.* c. 8, cannot be returned under the stat. 1 *W.* 4, c. 70, s. 8. *Gurney v. Gordon*, 11

2. The late stat. 1 *W.* 4. c. 70, s. 8, applies only to cases which are

originally commenced in the Court to which the writ of error is directed.  
*Ricketts v. Lewis*, 11

(2) *Costs of.*

*See Attorney-General v. Key*, p. 10.

ESTREATS.

*Verification of.*

Where the amount is under 5*l.*, clerks of the peace, &c. may verify their returns of estreats, &c. to this Court by affidavit, without a commission or personal appearance. *Ex parte Tomlins*, 122

EVIDENCE.

*See* BANKRUPT.

DEEDS.

DOWER.

EJECTMENT.

INSURANCE.

PARTICULARS OF DEMAND.

PLEADING.

POLICY.

SHERIFF.

TENDER.

VARIANCE.

VENUE.

1. *Quære*, as to the power of the Court to restrain a party from taking an objection to evidence at *Nisi Prius* —e.g. the production of an unstamped agreement. *Travis v. Collins*, 625

2. The printed particulars under which a sale by auction proceeds, cannot be varied by parol evidence of the verbal statement of the auctioneer at the time of the sale, either as to the parcels or quality of the subject-matter of sale. *Shelton v. Livius*, 411

3. It makes no difference, that the question arises on a sub-sale of the same subject-matter by the purchaser. *Ibid.*

EXECUTION.

*See* BAIL.

COMMITMENT.

HEIR.

SHERIFF.

A plaintiff cannot have concurrent writs of *fi. fa.* and *ca. sa.*, and act under both; and therefore, where a defendant was taken under a *ca. sa.*, before the return of a *fi. fa.* under which the plaintiff had seized, though the whole amount of the levy was swallowed up by the landlord's claim for rent, except 17*s.* 6*d.*, which went towards the expenses of the execution —The Court discharged the defendant out of custody. *Hodgkinson v. Whalley*, 86

EXECUTORS AND ADMINISTRATORS.

*See* LEGACY DUTY.

EXTENT.

*In Aid.*

An extent in aid having issued, the Crown debtor and debtor paravail referred all matters in difference between them to arbitration; afterwards and before the award was made, the debtor paravail took the benefit of the Insolvent Debtors' Act, and inserted in his schedule the debt due to the Crown debtor: the Court set aside the award, because the prosecutor was not entitled to prerogative privilege to secure him from the effect of a public statute upon the private agreement of the parties. *Rex in aid of Hollis v. Bayham*, 130

EXTORTION.

*See* SHERIFF.

FEES.

*See* ATTORNEY.

## GENERAL ISSUE.

### FEME COVERT.

*See* HUSBAND AND WIFE.

### FIERI FACIAS.

*See* EXECUTION.

### FOREIGNER.

*See* LEGACY DUTY.

### FORFEITURE.

*See* EJECTMENT.

## FORMER RECOVERY.

A landlord sued his tenant for rent and on the money counts, and gave particulars on the count for money had and received for a quantity of stone quarried and carried away by the defendant. At the trial he took a general verdict, but for the amount of the rent only. The plaintiff brought another action against the defendant in case, for quarrying and carrying away the stone, and, a few days before the trial of the first action, delivered a particular in the second action for the same stone, exactly corresponding with the particular delivered on the count for money had and received in the first action:—*Held*, that the recovery in the first action was no bar to the plaintiff's recovering in the second. *Hadley v. Green*, 374

## FRAUDULENT CONVEYANCE.

*See* DEED.

### FREE WARREN.

*See* DEED.

## GENERAL ISSUE.

*See* COSTS.

## HEIR.

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### GRANT.

*See* DEED I.

## GROWING CROPS.

*See* DISTRESS.

## GUARANTIE.

1. Guarantie, "If you give *A. B.* credit, we will be responsible that his payments shall be regularly made:"—*Held*, that the word *credit* meant a fair and reasonable credit, according to the manner in which *A. B.* and the persons guaranteed should deal, and did not confine the guarantie to dealings according to the strict customary credit of the trade. *Simpson and Others v. Manley and Another*, 12

2. Guarantie, "I engage to pay (plaintiff) for all the gas which may be consumed in the Minor Theatre, &c. during the time it is occupied by *A. B.*, and I also engage to pay for all arrears which may be now due:"—*Held*, that the agreement was void as to the arrears, but that the amount of the gas subsequently supplied might be recovered under a count for goods sold. *Wood v. Benson*, 94

## HABEAS CORPUS.

*See* COMMITMENT.

## HEIR.

In an action against an heir on the bond of his ancestor, the defendant pleaded *riens per descent*, and the plaintiffs replied, under the statute, that the defendant had assets, &c., before the action commenced, concluding with a verification; the jury assessed the damages under the condition of the bond, at a larger amount than the amount of the lands descended:—*Held*, that the execution

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for debt and costs must be confined to the value of the lands descended. *Brown v. Shuker and Others*, 311

## HUSBAND AND WIFE.

### I. Marriage.

1. In *February*, 1816, a marriage took place between two minors by licence, without consent. They cohabited until *June*, 1816, when, from the misconduct of the husband, he was obliged to leave the house where they had been residing. They then lived separate until *October*, 1817, when the husband died. After the separation, in *June*, 1816, he, on various occasions, insisted that she was not his lawful wife, and gave that as a reason for not living with her again. There was some slight evidence of small sums supplied to the wife being allowed in the rent of a farm held under the husband, but under what circumstances did not appear:—*Held*, that these parties did not live together as man and wife until the death of the husband, within the meaning of 3 Geo. 4, c. 75, s. 2. *Poole v. Poole*, 66

2. In an action against husband and wife, on the note of the wife made *dum sola*, a witness stated that he knew *A. B.* (the wife) formerly, and had heard that she afterwards married *E. F.* (the husband). The witness was not cross-examined:—*Held*, sufficient *prima facie* evidence of marriage. *Evans v. Morgan*, 453

### II. Liabilities of.

A wife, who was proved to have authority from her husband, a paper-maker, to do certain acts in his trade, pledged paper which had no wrapper, label, or departure stamp on it; the Chief Baron was of opinion at the trial that the husband was not liable for this act of his wife, but the Court,

## INJUNCTION.

upon motion, held that the authority of the wife was a question for the jury. *The Attorney-General v. Riddle*. 493

### III. Dower.

See DOWER.

## ILLEGAL CONTRACT.

See DEED.

## IMPARLANCE.

See PRACTICE.

## INCUMBENT.

See ECCLESIASTICAL LAW.

## INDORSEMENT.

*Of Bills of Lading.*

See SHIP.

## INFERIOR COURT.

See COURT OF REQUESTS.

## INFORMATION.

In an information for penalties for harbouring goods *liable to the payment of duty*, the jury found that the goods were imported in smuggling packages, and consequently were *restricted* from being imported:—*Held*, that such goods were, upon the construction of the stat. 6 Geo. 4, c. 107, s. 128, and 6 Geo. 4, c. 108, s. 52, *prohibited*, and should have been described as such in the information. *The Attorney-General v. Key and Others*, 2

## INJUNCTION.

Where an injunction had issued against the defendants in an equity suit, restraining them from disposing of the estate of their testator, the Court refused to stay proceedings against them in an action in which the

## INSURANCE.

debt was not admitted, observing that the injunction might be a ground for applying to stay execution. *Davis v. Salter*, 466

## INQUIRY, WRIT OF.

*When necessary.*

The Court will not set aside a final judgment by default in an action of debt, by reason of no writ of inquiry having been executed, unless it clearly appear that the action was not for a sum certain. *Weald v. Brown*, 672

## INSOLVENT.

1. The assignee of an insolvent debtor sued in the names of trustees for the insolvent, after having offered an indemnity to them, but without their consent. A Judge at Chambers set aside the proceedings; and the Court stayed the order and the proceedings until the trustees were indemnified. *Spicer and Another v. Todd*, 165

2. An insolvent brought an action to recover property acquired by him after his assignment; no motion had been made to the Insolvent Court to enable the assignees to issue execution against the property, and the Court refused to require security for costs. *Clapworthy v. Collier*, 631

## INSPECTION OF DOCUMENTS.

*See DEED III.*

## INSURANCE.

### I. Risk.

On the memorandum, "free from average under 3*l.* per cent.," the underwriter is liable for the amount of the aggregate of several partial losses, each less than 3*l.* per cent., but amounting together to more.

## IRREGULARITY. 703

*Blackett v. Royal Exchange Assurance Company*, 244

### II. Evidence.

In an action on a policy of insurance in the usual form, on ship, boat, &c., evidence of usage that the underwriters never pay for the loss of boats on the outside of the ship, slung upon the quarter, is inadmissible. *Blackett v. The Royal Exchange Assurance Company*, 244

## INTERPLEADING ACT.

*See SHERIFF.*

## IRREGULARITY.

1. An irregularity must be complained of at the earliest stage. Where, therefore, the plaintiff obtained a verdict in *Trinity Term*, upon which, on the 9th *June*, he signed judgment, without delivering a bill of costs; and, on the 10th or 11th, seized the defendant's goods in execution; and on the 21st a docket was struck; on the 22nd, a commission issued; and on the 24th, the defendant was adjudged a bankrupt; on the 5th *July* assignees were chosen; and, on 6th *July*, an application was made to set aside the proceedings:—*Held*, that the application was too late, and that, if there were an irregularity, it was waived. *Routledge v. Giles*, 163

2. Where, a rule *nisi* having been obtained to set aside an attachment for irregularity, the defendant's attorney offered to waive the proceedings and pay the costs; notwithstanding which the rule was persisted in—the Court made the rule absolute, with costs up to the time of the offer, the plaintiff's attorney to pay the costs subsequently incurred. *Haltan v. Stocking*, 60

## 704 LEGACY DUTY.

### JOINT TENANTS.

See EJECTMENT.

### JUSTIFICATION OF BAIL.

See BAIL.

### LANDLORD AND TENANT.

See DISTRESS.

EJECTMENT.

Where defendant, in expectation of a lease by indenture, which he had agreed to take from the plaintiff, procured attornments from some of the tenants, and received rents from others:—*Held*, liable for use and occupation. *Neal v. Swind*, 377

### LEGACY DUTY.

1. A testator gave a life estate in his freehold property to *C. T.*, and, after her decease, and in the event of her husband *J. T.* surviving her, he gave him an "annuity or yearly rent-charge" of 500*l.*, payable quarterly, "with such power and remedy of distress and entry, and perception of rents, in case the annuity should be in arrear, as are reserved to lessors for the recovery of rents on leases for years;" and, subject to that annuity, he gave his real estates in moieties to *R. J.* in fee, and to *W. J.* for life:—*Held*, that legacy duty was payable upon this devise to *J. T.*, by *R. J.* and *W. J.*, the parties interested in the land subject to the annuity, though interested in moieties, the one in fee and the other for life only. *The Attorney-General v. Randle Jackson and William Jackson*, 101

2. Property in this country belonging to a foreigner, who dies abroad, and appoints an *English* executor, and bequeaths to *English* legatees, is not liable to legacy duty. *In re Bruce*, 436

3. A testator, born in *America*, A.D. 1764, went to *Scotland* when

## LIBERUM TENEMENTUM.

a minor for the purposes of education, and, after he had attained his majority in 1788, sailed for *India*, describing himself in the ship's books as an *American*; he remained in *India* thirty years, when he returned to *Europe*, leaving the bulk of his property in *Bengal*; and afterwards, having been in *America*, visited *England*, *Scotland*, and the *Continent*, when he returned to *America*, entered into agricultural pursuits there, and continued to draw his property to that country until his death at *New York* in 1826:—*Held*, that he was an *American* citizen. *Ibid.*

4. A testator born in *Scotland*, who resided and died in *India*, leaving real and personal property there situate, but no assets in *England*, by his will and testamentary papers, left the whole of his property in equal divisions to his four natural children, or the survivors of them, and their heirs, subject to legacies and annuities. His executors obtained an *Indian* probate, and paid the debts and bequests, and converted the principal part of the estate into money, which they sent to their bankers in *England*, and invested it in the funds in their own names. Proceedings were commenced in *England* against the executors, to determine the claims under the will; whereupon the stock was transferred into the name of the Accountant-General of the Court of *Chancery*, and the Court made a decree ascertaining the shares of the several claimants:—*Held*, that the legacy duty was not payable on legacies or shares of the residue bequeathed. *Jackson v. Forbes*, 382

### LIBEL.

See PLEADING.

## LIBERUM TENEMENTUM.

See PLEADING.

## MORTGAGE.

### LIEN.

See STOPPAGE IN TRANSITU.

### LIMITATION, STATUTE OF.

The payment within six years, of interest due upon a note beyond six years, where the note remains in the hands of the payee, is sufficient to take the case out of the statute of limitations. *Bealy v. Greenslade*, 61

### LOSS.

See INSURANCE.

### MARRIAGE.

See HUSBAND AND WIFE.

### MEMORANDA.

1, 492, 686.

### MISNOMER.

*In Process.*

1. *William Hamilton M.* was arrested by the name of *William Henry M.*: he had signed an agreement with the initial letters of his Christian name, in which he was described as *William Henry M.*, and, on one occasion, had told the plaintiff that his name was *William Henry M.*: the Court refused to discharge him out of custody. *Newton v. Maxwell*, 215

2. Where a writ was to take *Christopher Hooper*, and the *English* notice was directed to *Christopher Wood*, the Court set aside the service for irregularity, with costs. *Wright v. Hooper*, 236

### MONEY PAID INTO COURT.

See PAYMENT.

### MORTGAGE.

A first mortgagee brought an ac-  
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## NEW TRIAL.

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tion on the covenant in the mortgage deed, having received notice from a second mortgagee not to deliver up the deeds. The mortgagor applied to the Court to compel the plaintiff, under the stat. 7 Geo. 2, c. 20, to reconvey the premises upon payment of the principal, interest, and costs; and the Court held it to be a case within the statute, and made the order. *Dixon v. Wigram*, 613

### NEGLIGENCE.

See ATTORNEY.

### NEWSPAPER.

A printer, who makes a false affidavit that he is sole proprietor of a paper, cannot sue the real proprietors for printing such paper, nor for any matter connected with or assisting its circulation. *Stephens v. Robinson and Another*, 209

## NEW TRIAL.

### I. When granted.

See PARTICULARS OF DEMAND.

1. When the sum in dispute is under 20*l.*, the Court will not grant a new trial, though the verdict is for the defendant. *Young, Gent., v. Harris*. 14

2. The Court refused a rule for a new trial, on payment of costs, for the purpose of enabling a defendant in trespass *q. c. f.*, to amend his plea of a right of way, which described the line of way incorrectly. *Edwards v. Broxton and Others*. 18

3. The rejection of evidence, which, if admitted, would merely prove a fact, sufficiently established by other evidence, is no ground for a new trial. *Alexander and Others v. Barker*, 133

4. Submitting to a nonsuit in deference to the opinion of the Judge

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at the trial, which opinion is incorrect, does not estop the plaintiff from moving to set aside such nonsuit. *Alexander and Others v. Barker*, 133

## II. Costs in.

See COSTS.

## NOTICE.

### I. Of Bail.

See BAIL.

### II. Of Trial.

Notice of continuance of notice of trial served on *Saturday*, the cause standing for *Monday*, is not sufficient. The intervening *Sunday* is not reckoned. *Grosjean v. Manning*, 635

## NUISANCE.

1. A proprietor of land adjoining a river has a right to raise the banks, from time to time, as occasion may require, upon his own land, so as to confine the flood water within the banks, and to prevent it from overflowing his land, with this single restriction, that he does not thereby occasion an injury to the lands and property of other persons; and if, being in the actual exercise of this right, an aqueduct and embankment be built lower down the river, it will be subject to the enjoyment of such rights as the landholder possessed at the time when it was constructed. *Trafford and Others v. The King, on the Prosecution of the Trustees of the late Duke of Bridgewater*, 265

2. If an aqueduct be built, so as, in times of flood, to pen back the water of a river, and cause it to overflow the lands of the adjoining proprietors, they may raise fenders to protect their lands, even though the water of the river be thereby forced against and endanger the aqueduct, unless, by the construction or raising of the

## OBLIGOR AND OBLIGEE.

fenders, the proprietors impede what was, before the erection of the aqueduct, the ancient and accustomed course for the escape of the water in times of flood. *Ibid.*

3. Where, therefore, upon an indictment against the proprietors of land adjoining a public navigation, for a nuisance in erecting and continuing fenders on the banks of a river, whereby the water of the river was forced against the sides and aqueduct of the canal, it appeared that the canal was carried across the river and adjoining valley by means of an aqueduct and embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that, in times of flood, the water, which was penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, through the arches in the embankment to the river, doing much damage to the lands over which it passed; that the aqueduct was sufficient for the passage of the water at all times, except in times of high flood; and that, on either side of the river and brook, there were fenders to prevent the waters from overflowing the lands adjoining, which fenders had been raised from time to time, as occasion required: but it did not appear whether the raising of the fenders was, or was not, an accustomed usage before the construction of the canal; nor what was the ancient course of the water in times of flood; nor whether the raising of the fenders was, or was not, necessary, in consequence of the construction of the canal:—*Held*, that no judgment could be given. *Ibid.*

## OBLIGOR AND OBLIGEE.

See BOND.

## PARTICULARS OF DEMAND.

### OFFICE.

The appointment of a school-master, elected by a majority of the trustees at a meeting assembled for the purpose of the election, need not be in writing; nor can he be dismissed, except by a majority of the trustees at a similar meeting. *Wilkinson v. Malin and Others*, 636

### PARLIAMENT.

#### I. Bribery and Treating.

1. To come within the treating act, 7 & 8 W. 3, c. 4, s. 1, the acts mentioned in that statute must be done by the candidate, or some person acting for him and on his behalf, in order to be elected. *Hughes v. Marshall and Others*, 118

2. Where supporters of a candidate gave orders to the landlord of a public-house, opened by the committee of the candidate, to supply others with refreshments, which were supplied on the credit of those who gave the orders:—*Held*, that it was not within the treating act. *Ibid.*

3. If refreshments be supplied to voters, with a view to influence the election, it is bribery, and no action can be maintained for such supply. *Ibid.*

4. *Quære*, whether moderate refreshment may not be supplied to out-voters who come from a distance. *Ibid.*

#### II. Expenses of Petition.

The costs occasioned by a frivolous and vexatious election petition, may be recovered under the stat. 9 Geo. 4, c. 22, ss. 57, 69, against one of several petitioners. *Gurney v. Gordon and Another*, 614

## PARTICULARS OF DEMAND.

### I. How obtained.

Where the particulars of the plain-

## PARTNERS.

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tiff's demand exceed three folios, the Court will order the plaintiff to deliver to the defendant full particulars of his demand, the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial, even though the defendant has had full particulars of the account before action brought. *James, Gent., v. Child*, 252

### II. Effect of.

1. Where the particulars of the plaintiff's demand were on an account stated, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum was inadmissible for want of a promissory note stamp:—*Held*, that the account stated might be proved by other evidence than the memorandum. *Held*, also, that verbal evidence was admissible of an admission of the money being due, and a promise to pay it by instalments, though such admission and promise were made at the time of signing the memorandum, and were embodied in it. *Singleton (Executor) v. Barrètt*, 368

2. Where the plaintiff annexed to the record particulars varying from those delivered to the defendant, and, there being no evidence of the particulars delivered, got a verdict upon an item not included in the particulars delivered, the Court granted a new trial without costs; but refused to nonsuit the plaintiff, because the defendant was not in a condition to raise the question at the trial, and the point was not reserved. *Morgan v. Harris*, 461

## PARTNERS.

### Rights and Liabilities of.

1. Where *A.* applied to *B.*, a member of a banking establishment, for a loan of money, which *B.* advanced out of funds in which he and his partners were jointly interested:—

*Held*, that the firm might sue *A.* for money lent. *Alexander and Others v. Barker*, 133

2. Where one of two partners, having authority to bind the other by drawing or indorsing bills of exchange, raised money by bills in fictitious names, indorsed by him in the partnership firm, and the money was afterwards applied to the partnership purposes :—*Held*, that the other partner was liable to the persons from whom the money was so obtained. *Thicknesse and Another v. Bromilow*, 425

## PAYMENT OF MONEY INTO COURT.

### *Effect of.*

A defendant paid into Court 1*l.* 3*s.* 7*d.* under an order which did not contain the usual undertaking from the defendant to pay the costs ; and it being doubtful whether the plaintiff, if he accepted that sum, would be entitled to costs, the defendant offered to give the plaintiff judgment of the term for that sum, in order to take the opinion of the Court upon the question ; the plaintiff, notwithstanding, took the cause to trial, and, upon the production of the rule to pay money into Court, had a verdict for one shilling ; the Court, upon motion, ordered the plaintiff to pay to the defendant all costs incurred subsequently to the offer. *Jones, Assignee of Thomas, v. Owen*, 476

## PLEADING.

### I. Declaration.

#### (1) *Correspondence with Process.*

If a plaintiff issue a venire against two persons, he may declare against one only. *Bowles v. Bilton*, 474

#### (2) *Conclusion of.*

A declaration in the *Exchequer* (before the uniformity of process act)

## PLEADING.

omitting to conclude *quo minus sufficiens*, &c. is bad on special demurrer. *Nickling v. Dickens*, 622

### (3) *In Assumpsit.*

1. A count in *indebitatus assumpsit* stated the promise to pay several sums of money, in consideration of being indebted in those sums for the several matters which were respectively stated in the count :—*Held*, that it was no objection to the whole count, on special demurrer, that one of the matters stated was insufficient and bad as a consideration for that part of the promise which related to it. *Ring, Administratrix of John Ring, deceased, v. Roxbrough*, 418

2. Every material and traversable fact must be laid with time and place. A count in *indebitatus assumpsit* stated the time of the defendant being indebted to the plaintiff's testator in his lifetime, and of his making the promise on the 2nd day of *January*, 1832, and stated the time of the grant of letters of administration to the plaintiff on the 11th of *January*, 1831 :—*Held*, on special demurrer, that the allegations were inconsistent, and the count bad ; and that one of the allegations of time could not be rejected as surplusage, as then a material and traversable fact would be laid without a time. *Ibid.*

3. It is no objection, on general demurrer, to a count in *assumpsit*, that the promise is stated under a *whereas*. *Ibid.*

4. *Semble* that it would be no objection on special demurrer. *Ibid.*

### (4) *In Slander.*

In an action of slander, the declaration stated the *colloquium* to be of and concerning certain meat of one *A. B.*, which he had before purchased of the plaintiff, *who had before then purchased the same of certain other*

persons, and had paid for the same. The declaration then stated, that the slanderous words complained of, imputing that the plaintiff had stolen the money with which he paid for the meat, were spoken of and concerning the said meat. The part of the inducement, which stated, that the plaintiff had purchased the meat and paid for it, was not proved:—*Held*, that the want of such proof was immaterial. *Cox v. Thomason and Wife*, 361

## II. Pleas in Abatement.

See ABATEMENT.

## III. Pleas in Bar.

To a plea of *liberum tenementum* in certain persons, the plaintiff replied, soil and freehold in the same persons as trustees of a charitable fund, and in no other right whatsoever; and that the premises had been used by those persons, and their predecessors, as such trustees, for a school-house, and for the residence of the schoolmaster; and that the plaintiff was duly appointed schoolmaster of the said school-house, by the then trustees of the said charitable fund, not naming nor stating a seisin in fee in the trustees who had appointed, nor any power by which the appointment was made, nor the trusts of the charitable fund, nor the deed by which they were created:—*Held*, good on motion to arrest the judgment. *Wilkinson v. Malin and Others*, 656

## POWER.

A power of sale in a settlement over-riding estates in fee, to be exercised (by trustees in whom the estates were vested in fee) with consent of the tenant for life, during his life, and, after his death, at the discretion of the trustees for the time

being, is a valid power, to be exercised by the original trustees during the life of the tenant for life. *Boyce v. Hanning*, 334

## PRACTICE.

### I. Process.

See MISNOMER.

1. The old process might be made returnable on a day between the *Thursday* before, and *Wednesday* after, *Easter-day*. *Hall v. Welchman*, 472

2. Process must be indorsed with the name of the attorney immediately employed, pursuant to stat. 2 Geo. 2, c. 23, s. 22: the name of the agent is not sufficient. *Shephard, Assignee, &c., v. Shum*, 632

3. The signature of the Clerk of the Pleas at the foot of a *quo minus* is merely to authenticate it, and the copy served upon a defendant need not contain such signature. *Clutterbuck v. Wiseman*, 213

4. A writ directed to the Sheriff of *London* is not irregular. *Ibid.*

5. Where a *quo minus* was served on the 29th *December*, 1831, and the *English* notice required the defendant to appear on the 11th *January*, 1831, the Court refused to set it aside, because the mistake could not mislead the defendant. *Ibid.*

6. Where one of several defendants in an action *ex contractu* is abroad, the Court will not order that service of the process upon the wife of such defendant may be deemed good service, nor restrain the other defendants from pleading in abatement. *Davies v. Morgan and Others*, 237

7. A defendant who seeks to set aside the service of process, upon the ground that it was served out of the proper county, must shew by affidavit that the place where he was served was not on the confines of the county. *Coulson v. King*, 474

## II. *Impar lance.*

1. By the late rule of Court there is no impar lance where the writ, appearance, and declaration are of the same term, if the declaration be delivered on or before the last day of term; but if the writ and appearance be of one term, and the declaration of another, the defendant is entitled to an impar lance, notwithstanding the late rule. *Edensor v. Hoffman and Another*, 140

2. If the defendant, being entitled to an impar lance, take out a summons for time to plead, which is indorsed by consent, he waives the impar lance, and the plaintiff may sign judgment for want of a plea before the enlarged time for pleading has expired, if no order be drawn up. *Ibid.*

3. The plaintiff filed a declaration, which was bad on special demurrer; the defendant impar led, and then demurred specially. The Court refused to allow the plaintiff to sign judgment, because the impar lance did not estop the defendant from objecting to the form of the declaration. *Pim v. Woodman*, 464

## III. *Time for Pleading.*

1. Process was returnable, and served on the 4th of *November*, and a declaration delivered *de bene esse* on the 10th, indorsed "to appear and plead in eight days." The plaintiff, on the 14th, entered an appearance for the defendant, and, on the 18th, the defendant appeared, and the plaintiff, on the 19th, signed judgment without demanding a plea: *Held*, that the indorsement on the declaration enlarged the time for the defendant to appear in, and that the judgment signed without demanding a plea was irregular. *Willett v. Wilson*, 356

2. Where a plea was delivered after the time for pleading had expired, but before judgment was actually signed, of which the plaintiff's attorney was apprized, but afterwards signed judgment, because the time for pleading was out, the Court set aside the judgment for irregularity, and ordered the costs to be paid by the plaintiff's attorney. *Amphill v. Semple*, 358

## IV. *Setting aside Pleas.*

The Court refused to set aside a plea of judgment recovered on affidavit of its being totally false, though there did not remain time for the plaintiff to get judgment in the term, he having neglected to take the regular steps for that purpose in the earlier part of the term. *Poole v. Salter*, 85

## V. *Time for Rejoining.*

A defendant, under terms to rejoin gratis, must rejoin within twenty-four hours. *Clark v. Adams*, 683

## VI. *Judgment.*

### (1) *By Confession.*

1. A *cognovit*, dated the 3rd of *November*, by which 5*l.* was to be paid on the 5th, and the residue of the plaintiff's demand at stated periods, the plaintiff being at liberty to sign judgment and issue execution for the whole upon any default, was signed by two defendants, *W. T.* and *J. T.*, on the 3rd, and by the other defendant, *I. J.*, on the 7th. On the 7th, the first instalment was paid to the plaintiff's attorney's clerk, who had no authority to receive it: and subsequently, on that day, judgment was signed; on the 8th, notice was given to tax costs on the 9th, which, at the request of one of the defendants, was postponed till the 10th. On

the morning of the 10th, the defendants' attorney received a notice to attend the taxation of costs at two o'clock that day; he did not attend, and the costs were taxed in his absence:—*Held*, that the judgment was regular—that the execution of *I. J.*, on the 7th, related back to the 3rd—that the acceptance of the instalment by the clerk without authority did not waive the default—and that it was unnecessary, under the circumstances, to give a full day's notice to tax costs on the 10th. *Perry v. William Turner, James Turner, and Isaac Joel*, 89

2. *Quære*.—Whether the omission to give one day's notice to tax costs, renders a judgment for debt and costs irregular. *Ibid.*

3. In *March*, 1823, the defendant having been served with a new rule in *Carnarvonshire*, signed a *cognovit* at the foot of a *concessit solvere*; in *October*, 1830, the plaintiff issued a *queritur*, which was not served, signed judgment, and removed the proceedings into this Court; afterwards the plaintiff took a summons to issue execution, which, with a notice to tax costs, was served upon the defendant; the defendant did not attend the summons or taxation of costs, but prayed time to pay the debt:—*Held*, that the judgment was regular according to the practice of the late Court of Great Sessions, and that the plaintiff, by his subsequent conduct, would have waived any irregularity in the judgment. *Williams v. Williams*, 55

## (2) *As in Case of a Nonsuit.*

1. In this Court, there is no rule to enter the issue; but four days' notice must be given before motion for judgment as in case of a nonsuit. *Coltsworth v. Martin*, 123

2. Where the defendant's attorney

had agreed with the plaintiff's attorney to accept short notice of trial, or no notice at all; and, in consequence of this arrangement, no notice was given, but both parties attended the assize town with their witnesses, and the plaintiff's attorney did not enter the record:—*Held*, that the defendant was not entitled to judgment as in case of a nonsuit. *Downes v. Cross*, 466

3. In an affidavit for judgment as in case of a nonsuit, it is not sufficient to swear that the plaintiff replied, and that the cause is *thereby* at issue. It must be sworn, without qualification, that the cause is at issue. *Smyth v. Parslow*, 217

## (3) *When it may be Signed.*

1. A plea pleaded irregularly does not entitle the plaintiff to sign judgment before the time for pleading has expired. *Nolleken v. Severn*, 333

2. Judgment for want of a plea may be signed on a holiday. *Bennet v. Potter*, 622

## (4) *When Set Aside.*

The Court set aside the judgment on payment of costs, on an affidavit by defendant's *agent* in town that he was informed and believed there were merits, there being circumstances of contrivance in the delivery of the declaration. *Johnson v. Popplewell*, 544

## (5) *Must be Docketed.*

Docketing the issue is not a sufficient docketing of a judgment, within the provisions of 4 & 5 *W. & M. c.* 20:—*Held*, that the committee of a lunatic, who had received and paid over rents to a subsequent mortgagee, was not liable in an action for money had and received to a judgment creditor, to whom the land had

been delivered by the Sheriff, under an *elegit* sued out upon a judgment prior to the mortgage, of which judgment there was no docket, though the issue had been docketed. *Braithwaite and Another v. Edward Watts*, 318

## VII. Venue.

1. If the defendant seeks to change the venue upon the special ground that the witnesses on both sides reside in the county into which the venue is to be changed, he must swear that it will be necessary to call witnesses in his defence. *Crompton v. Stewart*, 473

2. The defendant cannot change the venue after an order for time to plead, "on the usual terms," either in town or country causes, whether the trial will be delayed or not. *Notts v. Curtis*, 345

3. As the defendant, in a country cause, where the plaintiff could not be delayed, might have had special terms inserted in the order for time to plead, so as to save his right to apply to change the venue; the Court, on an order for time to plead, on the usual terms, being shewn for cause against a rule to change the venue, allowed the order to be amended, by the insertion of such special terms, on payment of costs. *Ibid.*

## PRINCIPAL AND AGENT.

*See AGENT.*

## PRINTER.

*See NEWSPAPER.*

## PRISONER.

*See COMMITMENT.*

## PROCESS.

*See PRACTICE.*

## SECURITY FOR COSTS.

## PROHIBITED GOODS.

*See INFORMATION.*

## PROMISSORY NOTE.

*See BILLS AND NOTES.*

## PROMOTIONS.

1, 492, 685.

## RECTOR.

*See ECCLESIASTICAL LAW.*

## RENDER.

*See BAIL.*

## REQUESTS, COURT OF.

*See COURT OF REQUESTS.*

## REVENUE.

*See AFFIDAVIT.*

INFORMATION.

LEGACY DUTY.

## RIVERS.

*See NUISANCE.*

## RULES OF COURT.

1, 167, 491, 685.

## RULE NISI.

After the day mentioned in the rule no cause can be shewn against a rule *nisi* for costs of the day. *Scott v. Marshall*, 60

## SCHOOLMASTER.

*See OFFICE.*

## SCIRE FACIAS.

*See BAIL.*

## SECURITY FOR COSTS.

*See COSTS.*

## SHERIFF.

### SEQUESTRATION.

See ECCLESIASTICAL LAW.

## SHERIFF.

### I. Privilege of.

If the execution creditor does not appear upon a rule to relieve the Sheriff under the Interpleader Act, the Court will order the Sheriff to withdraw from possession, but will not direct the execution creditor to pay the Sheriff the costs of keeping possession. *Field v. Cope*, 480

### II. Liability of.

1. A Sheriff, who, under a writ of *fiery facias*, seizes and sells goods of a bankrupt, before commission, but after an act of bankruptcy, without notice of the act of bankruptcy, is not liable in trover; but a Sheriff's bailiff, who has taken an indemnity from the execution creditor, is so liable. *Balm and Others, Assignees of Bankhart and Benson, Bankrupts, v. Hutton, Esq., Jewison, Esq., Ingham, Wood, and Others, (overruled in error)*, 19

2. On the 21st November, the plaintiff ruled the Sheriff to return the writ; the Sheriff made his return as of Michaelmas Term, and, on 30th November, after the Sheriff had returned the writ, the plaintiff took out a rule for the Sheriff to bring in the body, which was dated as of the last day of Michaelmas Term, and served on the 3rd December:—The Court granted an attachment against the Sheriff for not bringing in the body. *Heywood v. Jackson*, 208

### III. Evidence against.

In an action against the Sheriff for the extortion of his officer, the plaintiff proved an examined copy of the writ on which the officer's name was indorsed, and that a person of

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that name actually executed the writ, and that the course of the Sheriff's office was, that the name of the officer to whom the warrant was granted was usually indorsed on the writ:—*Held* sufficient *prima facie* evidence to connect the Sheriff with the acts of the officer. *Scott, qui tam, &c. v. Marshall and another, Sheriff of Middlesex*, 238

## SHIP AND SHIPPING.

1. On the 10th June, 1830, *W. R.* mortgaged, by bill of sale, to *W. & Co.*, the ships *Lady East*, *Pyramus*, and *Sprightly*, then being at sea. The bill of sale contained an assignment of the freight and policies. On the 12th June, the said bill of sale was entered in the book of registry. On the 18th October the *Sprightly* returned to port, and sailed again on the 16th November. On the 7th Jan., 1831, *W. R.* mortgaged the same ships, freights, and policies to the petitioners by bill of sale, containing a recital of and subject to the first mortgage; on the 11th May, 1831, the said second bill of sale was entered in the book of registry; on the 14th June, *W. R.* became bankrupt; on the same day, the *Pyramus* arrived from sea; and on the 15th July, the *Lady East* arrived from sea; on the 21st June, both mortgages were indorsed on the certificate of the *Pyramus*; and, on the 16th July, both mortgages were indorsed on the certificate of the *Lady East*. The *Sprightly* was lost at sea:—*Held*, that the second mortgage was valid as to the interest in the ships, freights, and policies. *Ex parte Jones and Others, in the matter of William Richardson, a Bankrupt*. 513

2. *Semble*, that a bill of sale, purporting to be a second mortgage of a ship, is not such a transfer of the

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*same* interest in a ship within the 39th section of the 6 Geo. 4, c. 110, as requires the thirty days mentioned in that clause to elapse before the officers can enter such a second mortgage in the book of registry; that clause applying to the case of instruments under which there may be conflicting claims, and not to the case of a second mortgage consistent with, and subject to, the first. *Ibid.*

3. Accruing freight passes to the mortgagee of a ship, who takes possession before the conclusion of the voyage, notwithstanding the 6 Geo. 4, c. 110, s. 45, which enacts that the mortgagee shall not be deemed owner except so far as necessary for the purpose of rendering the ship, &c., available, &c., for the payment of the debt, for securing the payment of which the transfer shall have been made. *Kerswill v. Bishop*, 529

### SLANDER.

*See* PLEADING.

### SMUGGLING.

*See* INFORMATION.

### SOLICITOR.

*See* ATTORNEY.

## STATUTE OF LIMITATIONS.

*See* LIMITATIONS.

## STOPPAGE IN TRANSITU.

Where goods were conveyed by a carrier by water, and deposited in the carrier's warehouse for the convenience of the vendee, to be delivered out as he should want them:—*Held*, that the transitus was at an end, and the vendor's right to stop in transitu gone, although it appeared that the carrier claimed to have a lien on the goods. *Allan v. Gripper*, 218

## VARIANCE.

### SURRENDER OF TERM.

*A.* devised an estate to trustees for years, with remainder to *B.*, which *B.*, 18 years after the death of *A.*, treated as his freehold, and leased for lives. In an action by the lessee of *B.*, as reversioner, the jury were told, that they could not presume a surrender of the term by the trustees to *B.*; and, upon motion, the direction was held to be right. *Day v. Williams*, 460

### TENDER.

A tender in country bank notes is a good tender if the creditor only objects to the *quantum* and not to the *quality* of the tender. *Polglass v. Oliver*, 15

### TRIAL.

*See* NEW TRIAL.  
PRACTICE.

### TROVER.

*See* SHERIFF.

### TRUSTEES.

*See* CHARITABLE USES.  
PLEADING.

### UNDERWRITER.

*See* INSURANCE.

### USAGE.

*See* INSURANCE.

## USE AND OCCUPATION.

*See* LANDLORD AND TENANT.

## VARIANCE.

### I. *Between Pleading and Process.*

*See* PLEADING.

### II. *Between Affidavit and Declaration.*

*See* AFFIDAVIT.

III. *Between Pleading and Evidence.*

See PLEADING.

1. An allegation, that certain persons were seised in fee of the premises, and used the same as a school-house, and also as and for the residence of the schoolmaster of the said school-house, is not inconsistent with evidence of a trust deed, limiting the nature of the appointment, and regulating the manner of dismissal; and possession of the premises is incident to the appointment of schoolmaster, whilst that employment continues. *Wilkinson v. Malin and Others*, 636

2. Evidence of an appointment as schoolmaster at a salary of 20*l.* a year to himself for teaching boys, and 20*l.* a year to his wife for teaching girls, satisfies an allegation of an appointment at a salary of 40*l.* *Ibid.*

## VENIRE.

See DISTRINGAS.

## VENUE.

See PRACTICE.

An undertaking to give material evidence in the county in which the venue is retained, in an action for goods sold and delivered, is satisfied by proof of letters, containing invoices of goods, having been put into the post-office in that county at the time the goods were forwarded. *Linley v. Bates*, 659

## WARRANT OF ATTORNEY.

On motion to enter up judgment on a warrant of attorney, the subscribing witness, if any, must make affidavit of the execution. It is not sufficient for him to sign the affidavit in the character of the commissioner before whom it was sworn. *Field v. Bearcroft*, 217

## WATER COURSE.

If land with a run of water upon it be sold, the water passes with the land, and the vendee having used the water for less than twenty years gains a title by appropriation, and may maintain an action for obstructing it. *Canham v. Fisk*, 126

## WILL.

Construction of.

1. A testator, amongst several other bequests and devises to his grandchildren, gave to his granddaughter *M.* a house called *Plasbach* (a freehold), remainder, on her death without issue, to her brother, *W. R.* He afterwards gave to his wife "the sum of 20*l.* yearly and every year, to be paid out of the freehold estates, and the lease of *Penlan* (a leasehold), by trustees thereafter named, and at the same time, notwithstanding there would be nothing to the grandchildren as long as their grandmother lived." The testator afterwards nominated and appointed *E. F.* and *G. H.* "as trustees to look in that justice should be duly administered between the said parties." *M.* died in the testator's lifetime, and the wife survived the testator:—*Held*, that *W. R.* did not take the legal estate, but that it vested in the trustees. *Anthony v. Rees and Another*, 75

2. A testatrix, after a preamble, "as for such temporal estate as God hath given me, I give, devise, and dispose of it in the following manner:" gave to *J. R.* a house, &c., to come into possession at the age of eighteen, and to *S. R.* two other houses, &c. (without using any express words to pass the fee), and the residue of her estate, which was limited by enumeration to personalty: she also gave to *S. R.* the rent of the house before given to *J. R.* until he was eighteen,

and, in the event of his death before that age, directed that all that was left to him should descend and go to *S. R.*:—*Held*, that *S. R.* did not take an estate in fee in the two

houses. *Doe d. Knocker v. Ravell and Others*, 617

WRIT.

*See PRACTICE.*

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